92-582

No. _____

Supreme Court
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JODIE DENISE PAUL,
Petitioner,
v.
EUGENE MOORE AND EDITH MOORE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

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QUESTIONS PRESENTED

1. Whether it is a violation of a natural mother's constitutionally cognizable substantive and procedural due process guarantees where her parental rights were terminated by a trial court order without any prior surrender or termination, without any prior notice of a termination hearing or the standards to be applied for termination, without any evidentiary hearing prior to termination, without any basis in evidence or law of her unfitness as a parent, and without any appellate review on the merits after her termination.

2. Whether it is a violation of a natural mother's Fourteenth Amendment substantive and procedural due process guarantees for a trial court order to grant parental rights to a private third party couple without any prior surrender or termination of the natural mother's rights, without any prior notice of a termination hearing or the standards to be applied for termination, without any evidentiary hearing prior to termination, without any basis in evidence or law of her unfitness as a parent, and without any appellate review on the merits after her termination.

3. Whether, even if the natural mother's parental rights were not deemed to be unconstitutionally terminated and even if the third party respondents were deemed to have constitutionally cognizable parental rights, it is a violation of a natural mother's Fourteenth Amendment substantive procedural due process rights for a trial court to terminate her parental rights and to grant parental rights to a third party couple without conducting an evidentiary hearing with notice on the best interests of the child.

LIST OF PARTIES

Parties

Jodie Denise Paul
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Eugene Moore
Edith Moore
Georgia Department of Human Resources
James G. Ledbetter
Patricia L. Johnson
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

The petitioner respectfully prays that a Writ of Certiorari issue to review the decision of the Georgia Supreme Court entered on July 2, 1992.

OPINIONS BELOW

The orders of the Georgia Supreme Court are not reported and are reproduced in Appendix F, H, and K, *infra* at pp. 33a, 37a and 40a.

The orders of the Georgia Court of Appeals are not reported and are reproduced on Appendix I and J, *infra* at pp. 38a and 39a.

The orders of the Fulton County Superior Court, Georgia trial court are not reported and are reproduced in Appendix A through E, and G, *infra* at pp. 1a-32a and 34a.

JURISDICTION

The Georgia Supreme Court's denial of the petitioner's Petition for Writ of Certiorari was entered on July 2, 1992. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution, U.S. Const., amend. XIV, § 1, provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Statement of Facts

After being switched in error with another child in a Georgia maternity ward in October 1983, the natural son of petitioner Jodie Denise Paul was then mistakenly placed in April 1984 in the physical custody of the respondent Moores by the Georgia Department of Human Resources.[1] R-89 and 346. This occurred without the petitioner Mrs. Paul's knowledge or consent. R-346. An adoption was

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[1] The petitioner Jodie Denise Paul, formly Jodie Denise Pope, remarried this past year and changed her last name to that of her second husband.

then attempted by the respondent Moores for another child, who is specifically identified in the Georgia Department of Human Resources adoption proceeding records as a child other than Mrs. Paul's son, but who was not even physically present himself to be adopted. R-89 and 346.

Through the 1989 opening of the records of the 1984 adoption proceeding, and upon learning of her natural son's location in Kentucky, the petitioner Mrs. Paul contacted the respondent Moores in order to reestablish contact and a relationship with her son. Mrs. Paul's parental rights to her natural child had never been surrendered nor terminated at law. R-346.

It was then over a visit from her natural son during the November 1991 Thanksgiving weekend, that Mrs. Paul was informed of the mounting charges of child abuse against respondent Edith Moore by dozens of the respondents' own neighbors and former neighbors. R-622. Hearing about this case, and recognizing respondent Edith Moore in the media, these people came forward on their own from Alaska to Massachusetts to Kentucky to bear witness on behalf of an eight-year-old child to the severe and on-going physical, verbal and emotional abuse inflicted by the respondent Edith Moore upon Mrs. Paul's son. R-622. On the basis of the sworn statements, the petitioner Jodie Denise Paul decided not to return her natural son to that type of environment in Kentucky and he remains today reunited with his natural mother here in Georgia pending the outcome of this appeal. R-622.

Procedural Background

This action was instigated on February 15, 1991 by the respondents Edith and Eugene Moore of Kentucky when

they filed a tort and contract action against the Georgia Department of Human Resources and its employees in Fulton County Superior Court, Georgia for damages arising out of the mistaken placement of the petitioner's natural child with the respondents in 1984. R-89.

On March 27, 1991, the defendant Georgia Department of Human Resources filed its answer and crossclaims against the respondent Moores. R-132.

On April 1, 1991, the defendant Georgia Department of Human Resources filed its third party complaint against petitioner Jodie Denise Paul alleging she was negligent in failing to recognize the misplacement of her child and seeking contribution from her should it be deemed liable to the respondent Moores. R-259.

On May 2, 1991, the petitioner filed her answer to the Georgia Department of Human Resources third party complaint. R-319.

On May 21, 1991, petitioner Jodie Denise Paul filed a crossclaim for physical custody of her natural son against the respondent Moores. R-346.

On August 23, 1991, the trial court filed a Rule Nisi Order for the sole express purpose of addressing the issue of personal jurisdiction over the parties. R-16. App. 5a and 12a.

On October 2, 1991, the trial court entered an order denying the petitioner physical custody of her natural son and divested her of final decision-making authority over her son's welfare. The order by its own terms states "[i]n the event that any party files a notice of appeal, such filing of appeal shall act to stay the effect of this order until it be-

comes a final judgment as a matter of law." R-591. App. 16a.

On November 1, 1991, petitioner Jodie Denise Paul filed a direct Notice of Appeal to stay the effect of the custody order and simultaneously filed an Application for Discretionary Appeal, noting that the latter was done out of an abundance of caution. R-1.

On November 25, 1991, the Georgia Supreme Court denied the petitioner's Application for Discretionary Appeal. R-5. 33a.

On December 2, 1991, the petitioner filed an Extraordinary Custody Motion Based Upon Newly Discovery Evidence Showing Abuse Of Child By Edith Moore. R-622.

On December 3, 1991, the trial court order entered a Rule Nisi "to show cause if minor child known as Melvin Eugene Moore should remain in Georgia in the custody of Jodie Denise Paul pending ruling on the appeal presently before the Supreme Court of Georgia." R-83. App. 33a.

On December 4, 1991, trial Judge Frank Eldridge entered a Recusal Order. R-81.

On February 7, 1992, the Georgia Supreme Court transferred this case for consideration to the Georgia Court of Appeals. App. 37a.

On March 10, 1992, the Georgia Court of Appeals dismissed the direct appeal on the basis that it considered the appeal to merely be from a child custody order and that an application for discretionary appeal had been denied. App. 38a.

On March 25, 1992, the Georgia Court of Appeals denied the petitioner's Motion for Reconsideration. App. 39a.

On April 3, 1992, Petitioner Jodie Denise Paul filed her Petition for Writ of Certiorari with the Georgia Supreme Court.

On July 2, 1992, the Georgia Supreme Court denied the petitioner's Petition for Writ of Certiorari to the Georgia Court of Appeals. App. 39a.

REASONS FOR GRANTING THE WRIT

This petition of Jodie Denise Paul, formerly Jodie Denise Pope, involves one of the most sacred fundamental rights secured by the United States Constitution-- a natural mother's God given *parental rights* which were never surrendered nor terminated at law. The state court order from which this appeal is sought addressed first and foremost the respective parental rights of the parties. The constitutional dimensions of those parental rights were directly raised and squarely addressed at the trial level, albeit without the benefit of any evidentiary hearing. It is the inalienable aspect of those parental rights in this appeal which runs as deeply through the constitutional marrow of this country as any case imaginable.

This case presents important questions regarding fundamental parental rights never directly addressed by the Court. Under what circumstances may third parties possess constitutionally protected parental rights concurrent with those of the natural parent and, if any, to what extent does the constitution safeguard the natural parent's protected rights from state sanctioned infringement by such third-parties? As the norm for the traditional family changes in structure and function, and lower courts search for constitutional guidelines to apply to protected family interests, the facts of this case provide the Court with an unusual opportunity to review the due process contours of protected parental rights so clearly drawn in this context between the competing biological and psychological interests of a family.

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER IT IS A VIOLATION OF A NATURAL MOTHER'S CONSTITUTIONALLY COGNIZABLE SUBSTANTIVE AND PROCEDURAL DUE PROCESS GUARANTEES WHERE HER PARENTAL RIGHTS WERE TERMINATED BY A TRIAL COURT ORDER WITHOUT ANY PRIOR SURRENDER OR TERMINATION, WITHOUT ANY PRIOR NOTICE OF A TERMINATION HEARING OR THE STANDARDS TO BE APPLIED FOR TERMINATION, WITHOUT ANY EVIDENTIARY HEARING PRIOR TO TERMINATION, WITHOUT ANY BASIS IN EVIDENCE OR LAW OF HER UNFITNESS AS A PARENT, AND WITHOUT ANY APPELLATE REVIEW ON THE MERITS AFTER HER TERMINATION.

In the case at bar, the state trial court entered an order effectively terminating the parental rights of the petitioner and natural mother Jodie Denise Paul by denying her "physical custody" of her son and divesting her of the authority to make "final decisions" in all matters regarding her son's "education, welfare, morals, and development". Appendix E, *infra*, p. 30a.

Not only was there no basis in the statutory or case law of Georgia which would have authorized depriving the petitioner Jodie Denise Paul of her parental rights as the natural mother, there was also no prior notice given or hearing held during which she could have presented evidence and legal argument to defend her parental rights. *See supra*, pp. 12-13 & note 4. The petitioner was

not given a post-termination hearing at the trial court level and, recently, the Georgia Supreme Court has foreclosed her last opportunity to have any post-termination review on the merits. Appendix K, *infra*, p. 40a. As such, the state court orders which are the subject of this petition represent one of the most egregious examples of the state's unbridled and intrusive exercise of power into the parental rights of a natural mother.

The parental rights of a natural mother have long been recognized by this Court as being grounded in *liberty and privacy interests* protected under the Fourteenth Amendment to the United States Constitution. Indeed, the court has held "[t]he individual's freedom to marry and reproduce is 'older than the Bill of Rights' " itself. *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1976) [hereinafter cited as *OFFER*], *quoting Griswold v. Connecticut*, 381 U.S. 479 (1965). More specifically, the Court has noted the Fourteenth Amendment secured a natural parent's *"immediate right to the care, custody, management and companionship of...minor children."*[2] *May v. Anderson*, 345 U.S. 528, 533 (1953).

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[2] *Liberty Interests.* A natural parent's liberty interests secured by the Fourteenth Amendment "without doubt, ...denotes...the right of the individual...to marry, establish a home and bring up children." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) [state law held violative of the Fourteenth Amendment by forbidding the instruction of any modern language other than English to children who had not attained and successfully completed the eighth grade]. Parents have the constitutionally cognizable liberty interest "to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) [state law held violative of the Fourteenth Amendment which compelled the attendance of children in public schools rather than in parochial schools]. "[T]he custody, care and nurture of the child reside first in the parents... And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S.

> The Court has frequently emphasized the importance of the family. The right to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and "[r]ights far more precious...than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra*, at 399, the Equal protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra*, at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

Stanley v. Illinois, 405 U.S. 645, 651 (1971)

158, 166 (1944) [state law was upheld under the Fourteenth Amendment which as applied prohibited a minor from selling or offering for sale religious literature in public places]. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1971) [state law held violative of Fourteenth Amendment by requiring Amish to send their children to public or private school after the eighth grade].

Privacy Interests. In delineating the Fourteenth Amendment's "guarantee of certain areas or zones" of privacy, the Court has recognized that these personal rights "implicit in the concept of ordered liberty" include "activities relating to marriage...procreation...family relationships...and child rearing and education." *Roe v. Wade*, 410 U.S. 113, 152, 153 (1973). *See also Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 479 (1972); and *Stanley v. Illinois*, 405 U.S. 645 (1972).

The state trial and appellate court orders giving governmental sanction to the infringement of the petitioner's protected parental rights as the natural mother involve both the substantive and procedural due process guarantees of the Fourteenth Amendment.

First, as to the petitioner Jodie Denise Paul's *substantive due process rights* as a natural mother, the Court has held where such fundamental rights are involved that state action limiting those rights may be justified only by a "compelling state interest". *Kramer v. Union Free School District*, 394 U.S.. 621, 627 (1969); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); and *Roe v. Wade*, 410 U.S. 113 (1972). In the lower court order at issue, there is discussed at length the state's "compelling interest" in the care of "orphans and unwanted, neglected or abused minors". Appendix E, *infra*, p. 23a. None of the state interests discussed addressed a legitimate governmental interest in separating a fit and loving natural mother from her birth child. *Id.* Indeed, if the state in other circumstances could be imagined to possess a compelling interest for divesting a natural mother of her fundamental parental rights, they do not exist in the instant case and the lower court has not provided any insight as to what legitimate state interest may have served as the basis for its order.

Second, as to the petitioner Jodie Denise Paul's *procedural due process rights*, this court has held that "before a person is deprived of a protected interest, she must be afforded opportunity for some kind of a hearing, `except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' " *Board of Regents v. Roth*, 408 U.S. 564, 570 n. 7, *quoting Boddie v. Connecticut*, 401 U.S. 371,

379 (1971).[3] Even where an extraordinary situation justifies postponing a hearing, the procedural due process guarantees encompassed by the Fourteenth Amendment require providing an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

In deciding what procedural protections a particular situation demands, the Court has held "identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). In the instant case, in light of the abject dearth of any procedural safeguards ordinarily accorded constitutionally protected interests, it cannot be seriously contended the lower courts orders comported with the petitioner's Fourteenth Amendment due process guarantees.[4]

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[3] In a civil rights action stemming from a city child welfare bureau taking and retaining a natural mother's two children without her consent, the court held the initial taking was justified by an emergency situation due the mother's hospitalization, but that the continued refusal to return the children to their mother in the absence of a state initiated evidentiary hearing was violative of the natural mother's parental rights secured by due process guarantees under the Fourth Amendment. *Duchesne v. Sugerman*, 566 F.2d 817 (1977), *citing Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

[4] The state trial court order recognized that there had been *no prior voluntary surrender or legal termination* of the petitioner's parental rights. Appendix E, *infra*, p. 27a. Prior to rendering the order, and

In a case stemming from a habeas corpus proceeding to test the right as between a natural mother and a natural father to immediate possession of their minor children, the Court considered whether an *ex parte* custody order obtained by the father should be upheld. *May v. Anderson*, 345 U.S. 528 (1952). The Court in May opined that "where a mother is neither domiciled, resident nor present, [the state] may [not] cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam*." *Id.* at 533. Though the Court based its decision on the Full Faith and Credit Clause, and did not address except by footnote the Fourteenth Amendment challenge raised by the natural mother, implicit in the binding effect of any court ruling is that there be *in personam* jurisdiction as well as the other basic procedural due process guarantees contemplated by the Fourteenth Amendment.

The Court considered the fundamental due process rights of a natural parent when it reviewed and over-

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without giving notice of a termination hearing or the standards to be applied, the state trial court announced a rule nisi hearing solely to determine whether it had personal jurisdiction over the parties in the case. Appendices B and D, *infra*, pp. 5a-8a, and 12a-15a. Then, at the limited rule nisi hearing, the state trial court issued the order subject to this petition which it had prepared even before the hearing and which it entered afterward *without conducting an evidentiary hearing* on the substantive issues decided. T-42 and 43. Even in the absence of an evidentiary hearing, the state trial court conceded that "no grounds for termination [of the petitioner's parental rights] existed then or now." Appendix E, *infra*, p. 27a. As such, the state trial court's order was issued *without any basis in evidence or law of the petitioner's parental unfitness.* With the recent denial of the petitioner's Petition for Writ of Certiorari to the Georgia Supreme Court on her direct appeal, the last resort to the state's highest court has been exhausted and the trial court order remains in place *without any appellate review on the merits* after her termination. Appendix K, *infra*, p. 40a.

turned a state statute which automatically deprived unmarried natural fathers of the custody of their children upon the death of the natural mother. *Stanley v. Illinois*, 405 U.S. 645 (1972) [hereinafter cited as *Stanley*]. The Illinois statute in question declared such children state dependents once their natural mother died and did so without any hearing on the unmarried natural father's parental fitness or proof of neglect. " `[W]hat procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' " *Stanley* at 650 and 651, *citing Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

> The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements."

Stanley at 651, *citing Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J. concurring).

As to what is specifically required under the Fourteenth Amendment contours of procedural due process in order for the state to terminate parental rights, the guidelines are instructive which are noted in *Alsager v. District Court of Polk County, Iowa*, 406 F.Supp. 10 (S.D. Iowa 1975) [hereinafter cited as *Alsager*]. In *Alsager*, a state juvenile court order terminating the natural parent's parental rights was challenged on Fourteenth Amend-

ment procedural due process grounds. The natural parents successfully contended, *inter alia*, that the state had provided inadequate notice of the factual allegations of neglect and that the standard of proof improperly employed was a mere preponderance of the evidence rather than clear and convincing evidence. *See also Rivera v. Marcus*, 533 F.Supp. 203 (D. Conn. 1982), *infra*, pp. 24-25.

In the case *sub judice*, of course, there was no prior notice given that an order would issue terminating the petitioner's parental rights, no notice of any allegations was ever given before termination or at any time afterward by any party of parental unfitness, and no evidentiary hearing was ever held to determine her fitness as a parent. *See supra* pp. 12-13 & note 4. Moreover, with regard to the standard of proof, not only was there no clear and convincing evidence presented as to the petitioner's unfitness as a parent, but the lower court found that "no grounds for termination existed then or now." *Id.* Nonetheless, the lower court did in fact effectively terminate her parental rights to "physical custody" of her son and to make "final decisions" with regard to his "safety, welfare, morals, and development." *Id.*; Appendix E, *infra*, p. 27a.

The petitioner was accorded no post-termination hearing either at the state trial or appellate level for a review on the merits. Because Georgia law provides for a direct appeal as a matter of right in cases involving the termination of parental rights and for a discretionary appeal in cases involving only custody disputes between parents, the petitioner out of an abundance of caution pursued both appellate avenues by timely filing a Notice of Appeal

and an Application for Discretionary Appeal.[5] Nonetheless, despite the petitioner's absolute right to a appeal involving the termination of parental rights, the Georgia Supreme Court has recently foreclosed her last opportunity to be heard on the merits in the state appellate courts. Appendix K, *infra*, p. 40a.

In the absence of any pretermination hearing by the trial court or any post-termination review by the state appellate courts, it is clear that the state court orders giving express or tacit sanction to the deprivation of the natural mother's protected parental interest run up against the

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[5] In a case on all procedural fours with the instant case, where the appellant out of an abundance of caution also filed both a Notice of Appeal and an Application For Discretionary Appeal and where the Application For Discretionary Appeal was dismissed, the Georgia Court of Appeals held that "[a]ppeals from the termination of parental rights do not fall within the purview of O.C.G.A. § 5-6-35(a)(2), which requires discretionary appeal procedures for child custody cases." *In re R.L.Y., M.R.Y. & R.A.Y*, 180 Ga. App. 559, 559, 349 S.E.2d 800 (1986); *see also In re S.N.S.*, 182 Ga. App. 803, 357 S.E.2d 127 (1987) [appeal of parental right termination must be by direct appeal, not application for discretionary appeal].

Additionally, in a recent Georgia Supreme Court case which also dealt principally with a natural mother's unsurrendered parental rights and which also resulted in a child custody award, the court initially transferred the direct appeal to the Georgia Court of Appeals for review just as it did in the instant case. *Johnson v. Smith*, 251 Ga. 1, 302 S.E.2d 542 (1983) [hereinafter cited as *Johnson*]. As noted by Justice Weltner, "[t]he Court of Appeals interpreted our transferal as a determination that the case did not involve habeas corpus, but rather child custody, and dismissed for failure to file an application as required by O.C.G.A. § 5-6-35 []." After granting a writ of certiorari in *Johnson* to consider the court of appeal's dismissal, Justice Weltner noted in reversing the trial court's order and the court of appeal's dismissal that "this court will not convert an invalid consent to adoption into a valid contractual release of parental rights." *Johnson* at 3, *quoting Bozeman v. Williams*, 248 Ga. 606, 285 S.E.2d 9 (1981).

shoals of the Fourteenth Amendment procedural due process guarantees.

To summarize, the liberty and privacy interests of the petitioner Jodie Denise Paul's fundamental parental rights secured by the Fourteenth Amendment included the right to immediate physical care, management, custody and control of her son. Absent a compelling state interest, the state courts' orders were in violation of the petitioner's substantive due process guarantees through termination her parental rights by denying her physical custody of her son and by divesting her of final decision making authority over the child rearing decisions for her son. Furthermore, even if were there some demonstrable compelling state interest involved, the lower court violated the petitioner's procedural due process guarantees when it failed to provide her prior notice of the termination hearing or the standards to be applied for termination, failed to provide an opportunity to present evidence and cross examine witnesses at a hearing regarding her parental rights and fitness as a parent, and failed to provide a post-deprivation hearing at the trial or appellate levels for a review of the termination on the merits.

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER IT IS A VIOLATION OF A NATURAL MOTHER'S FOURTEENTH AMENDMENT SUBSTANTIVE AND PROCEDURAL DUE PROCESS GUARANTEES FOR A TRIAL COURT ORDER TO GRANT PARENTAL RIGHTS TO A PRIVATE THIRD PARTY COUPLE WITHOUT ANY PRIOR SURRENDER OR TERMINATION OF THE NATURAL MOTHER'S RIGHTS, WITHOUT ANY PRIOR NOTICE OF

A TERMINATION HEARING OR THE STANDARDS TO BE APPLIED FOR TERMINATION, WITHOUT ANY EVIDENTIARY HEARING PRIOR TO TERMINATION, WITHOUT ANY BASIS IN EVIDENCE OR LAW OF HER UNFITNESS AS A PARENT, AND WITHOUT ANY APPELLATE REVIEW ON THE MERITS AFTER HER TERMINATION.

As a threshold issue for determining the right of the respondents to challenge the constitutionally protected parental interests of the petitioner and natural mother Jodie Denise Paul, one must note that neither Georgia nor federal law provide for conferring parental rights to private third parties absent the prior surrender or termination the natural mother's parental rights. Nonetheless, the state trial court in this case has attempted to vest in the private third-party respondents a hybrid new strain of parental interest which it held grew out of the mistaken and illegal placement of the petitioner's natural son with the respondents.

It is noteworthy for comparing the Georgia and federal cases regarding any professed parental rights of third-parties that *property rights* which are protectable under the due process clause of the United States Constitution are generally created by state law and that *liberty interests* which are cognizable under the due process clause are a matter of federal constitutional law. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Boiling v. Sharpe*, 341 U.S. 497, (1971); *Stanley v. Illinois*, 405 U.S. 645 (1972).

Georgia Law. As a *necessary precondition* to any parental rights vesting in third parties, it has been the

bedrock law of Georgia family relations to first have the surrender or termination of the parental rights of the natural parents.

As the natural parent with legal custody and the concomitant substantive due process rights, Jodie Denise Paul also had the right to physical custody of her natural son, unaffected by the interest of any other party except the natural father as governed by their divorce decree. Nonetheless, without citing to any specific authority, without hearing any evidence, and instead working from the general wholecloth of "constitutional privacy rights", the trial court held that the appellee Moores had over a period of years been vested with parental rights through what it termed a "*de facto* adoption". Appendix E, *infra*, p. 27a. The direct and immediate consequence would be to deprive Mrs. Paul of the primary and undisturbed physical custody of her child that she otherwise would enjoy as the natural mother. There simply is no such statutory or case based authority for recognizing parental interests in private third-parties without the natural parent's voluntary surrender or legal termination of those rights.

This is not the first time in Georgia law where third parties, acting as the physical custodians of a child, have attempted to assert parental rights over the objections of a natural parent. Ordinarily, however, those third party custodians gained access to a child through some form of temporary consent from a natural parent or from an agency of the state who either stood in the place of the natural parent or had authority to grant temporary custody. Even in those cases where such temporary consent had been granted, Georgia law has never recognized the radically aberrant concept of a de facto adoption to third parties without notice to or over the objections of the nat-

ural parents. *A third party does not obtain the vesting of parental rights as one might a real estate prescriptive easement.*

In the case of *Drummond v. Fulton County Department of Family and Children Services*, 237 Ga. 449, 228 S.E.2d 839 (1976)[hereinafter cited as *Drummond*], the Georgia Supreme Court addressed the parental rights of a party legally serving as the natural parent the rights of third-party foster care parents. The third party Drummonds were a foster care couple who had raised a child for two-and-a-half years from the time the boy was one month old after he had been placed with them by Fulton County Department of Family and Children Services [hereinafter FCDFCS]. FCDFCS had acted as the natural parent with legal custody after the natural mother was found unfit and her parental rights were terminated by court order. The Drummonds advanced the same *de facto* parental rights argument which the state trial court in the instant case used as the linchpin of its decision. The Georgia Supreme Court in *Drummond*, however, *rejected the concept of de facto parental rights vesting in third parties arising from "the psychology dependency of a parent-child relationship which has been sustained over a period of time."* [Emphasis provided]. *Id.* at 450.

> The best interest of the child test is used only between parents who both have equal right to the child. Code Ann. § 74-107; *Knox v. Knox*, 226 Ga. 619, 176 S.E.2d 712 (1970). Where the dispute is between a natural parent and a third party, on the other hand, the court *must award the custody of the child to the parent unless he has lost his parental prerogatives under Code Ann. § 74-108 or is unfit.* [Emphasis provided].

Drummond at 451, *citing Edwards v. Cason*, 237 Ga. 116, 226 S.E.2d 910; *White v. Bryan*, 236 Ga. 349, 223 S.W.2d 710 (1976); *Knox v. Knox, supra; Perkins v. Courson*, 219 Ga. 611, 135 S.E.2d 388 (1964). *See generally* Stubbs, *A Summary of the Georgia Law of Children*, ch. 7 (1969).

It is noteworthy that this court in *Drummond* also considered the "right of family privacy" of third parties asserting parental interests arising simply from the years they spent raising that child. *Drummond* at 453. In the case at bar, the assertions of such privacy rights as a result of time spent with the petitioner's natural child also served as the essential starting point for the trial court's finding the existence of *de facto* parental rights. For the same reasons the Georgia Supreme Court found such privacy rights nonexistent in *Drummond* under Georgia law for third parties, they are without merit in the instant action. *Id; see also Drummond v. Fulton County Family and Children's Services*, 563 F.2d 1200 (5th Cir. 1977)(*en banc*), *cert. denied*, 437 U.S. 910 (1978), *infra* p. 24.

The case of *Larson v. Gambrell*, 157 Ga. App. 193, 276 S.E.2d 686 (1981) [hereinafter cited as *Larson*] also considered the parental rights of a natural parent against that of a third party -- the grandparents as blood relatives. In *Larson*, the natural mother had been awarded custody of her child in a prior divorce decree. She had then voluntarily relinquished physical custody to the child's maternal grandparents. In an action by the natural father for modification of the divorce decree to obtain custody of the child, the trial court awarded legal custody of the child to the maternal grandparents, noting that the child had lived with the grandparents for a year and that the grandparents were better able to provide for the needs of the child, even

though the natural father was not unfit. The Georgia Court of Appeals reversed the award of legal custody to the grandparents.

> [W]here a third party (e. g., a grandparent) is being awarded custody of a child as part of a divorce case, or where such a third party sues to obtain child custody from a parent, the test is not simply the "best interests" or "welfare" of the child because the parents are being deprived of custody of their child. In such cases, a parent is entitled to be awarded custody by the trial court unless it is shown by clear and convincing evidence that such parent is unfit or otherwise not entitled to custody under the laws.

Larson at 194.

> Before a child may be awarded to a third party, the presumption that it will be in the "best interest" of the child to be with his parent must be rebutted by a clear and convincing showing that the parent is "unfit" to be warded custody. *"The law contemplates that one of the natural parents will be awarded custody of the child unless the present unfitness of the parents is established by clear and convincing evidence at the hearing on permanent custody. Only then is the trial court authorized to consider an award of custody to third parties."* [Emphasis provided.]

Larson at 195, *citing Childs v. Childs*, 237 Ga. 177, 178, 227 S.E.2d 49 (1976).

Certainly, if the foster parents in *Drummond* and the grandparents in *Larson* are deemed to be third parties, even though they initially gained physical custody with the consent of a natural parent, then the respondent Moores must also be deemed to be third parties and without "prescriptive" parental rights conferred by state law. This is especially so because the petitioner never

consented to the respondents' custody and, in fact, has vigorously objected to the respondents' custody at every juncture. However creatively fashioned or euphemistically termed, *"de facto"* parental rights for third parties cannot exist without the prior surrender or termination of the natural mother's parental rights.

Federal Law. The Court has reviewed the applicability of Fourteenth Amendment due process guarantees to private third-parties when it considered the appeal of foster parents seeking to become vested with full parental rights in the case of *Smith v. Organization of Foster Families For Equality & Reform,* 431 U.S. 816 (1976) [hereinafter cited as *OFFER].* In *OFFER,* unlike the instant case, all of the children who were or had been in the physical custody of the various third-party foster parents had originally been placed there with the knowledge and consent of the natural parent. Even when there had been an initial voluntary placement by the natural parent's consent, and even where some of the children were not to be taken from the foster parent for return to the natural parent, the Court determined that the liberty interests of third-parties as foster parents do not rise to the level of fundamental parental rights cognizable by the Due Process Clause of the Fourteenth Amendment.

> It is one thing to say that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like association into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's *constitutionally recognized liberty interest that derives from blood relationship, state law sanction, and basic human right*-- an interest the foster parent has

> recognized by contract from the outset. Whatever liberty might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents. [Emphasis provided.]

Smith at 846 and 847.

Following the previously discussed case decided by the Georgia Supreme Court, *Drummond v. Fulton County Department of Children Services*, 237 Ga. 449, 228 S.E.2d 839 (1976), the same third-party foster care couple challenged in federal court the denial of their adoption petition which they asserted was decided solely on the basis of race. *Drummond v. Fulton County Department of Family & Children's Services*, 563 F.2d 1200 (5th Cir. 1977) (*en banc*), *cert. denied*, 437 U.S. 910, (1978). Following the Court's decision in *OFFER*, the United States Court of Appeals for the Fifth Circuit determined that foster parents, as third-parties seeking to adopt their foster child, did not have a liberty interest "of full-fledged constitutional magnitude" cognizable under the due process guarantees of the Fourteenth Amendment. *Id. See also Kyees v. County Department of Public Welfare*, 600 F.2d 693 (7th Cir. 1979); *Sherrod v. Owens*, 484 F.Supp. 728 (W.D. Mich. 1980), *aff'd* 644 F.2d 542 (6th Cir.), *cert. denied*, 454 U.S. 828, 102 S.Ct. 120, 70 L.Ed.2d 103 (1981).

In *Rivera v. Marcus*, 533 F.Supp. 203 (D. Conn. 1982), [hereinafter cited as *Rivera*] the court did recognize a protectable liberty interest in the foster parent triggering procedural due process safeguards. The court noted, however, that such liberty interests were cognizable only due to (1) the foster parent's "direct biological family tie to the foster children" as the half-sister of the natural mother, (2) the

relationship to the children did not have its origin in the power of the state in that it predated foster care by two years and was at initiated at the request of the natural mother, and (3) there was minimal potential for conflict with the liberty interests of the natural mother who was in the advanced stages of mental retardation. *Id.* at 208. The respondents' interests in the instant case are in conflict with all three qualifying criteria for *Rivera* court's exceedingly narrow exception to this Court's holding in *OFFER.*

Were the courts to dispense with the surrender or termination of a natural parent's rights as a necessary pre-condition to third parties obtaining parental rights, it is not difficult to predict how such a situation would *invite an unending spate of legal battles by well positioned would-be third party parents, bidding for the custody of children not their own on the basis of professed better intentions and ability to provide.*

The lasting life bond between a natural mother and child, her child by birth and by blood, is not a relationship severed through temporary separation. When a natural mother such as the petitioner has been tragically and involuntarily separated from her child, when they have already lost the first few precious years together, and when this occurs to a woman who risked her own life to bear that child and can never bear another child, the fundamental rights securing that relationship should certainly not be parceled out to third parties by a trial court ruling without a basis in law or evidence.

Even if it could be found that the respondent Moores could make a colorable claim to *de facto* parental rights, the petitioner Jodie Denise Paul would still have been

entitled to notice and an evidentiary hearing concerning such a matter affecting her own parental rights. As to what procedural due process safeguards are specifically triggered by constitutionally protected parental interests, *inter alia*, the *Rivera* noted the minimal necessity of a (1) timely and adequate notice of the reasons for termination, (2) a preremoval hearing, (3) an opportunity to confront and cross-examine witnesses, and (4) an opportunity to present evidence and arguments. *Rivera* at 209. Of course, the record is clear that none of these procedural safeguards were accorded the petitioner Jodie Denise Paul. *See supra* pp. 12-13 & note 4.

In short, the lower court's ruling abrogating the natural mother's parental rights and its failure to provide a hearing with notice before doing so, clearly violated the petitioner natural mother's substantive and procedural due process rights as recognized by the United States Constitution.

III. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER, EVEN IF THE NATURAL MOTHER'S PARENTAL RIGHTS WERE NOT DEEMED TO BE UNCONSTITUTIONALLY TERMINATED AND EVEN IF THE THIRD PARTY RESPONDENTS WERE DEEMED TO HAVE CONSTITUTIONALLY COGNIZABLE PARENTAL RIGHTS, IT IS A VIOLATION OF A NATURAL MOTHER'S FOURTEENTH AMENDMENT SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS FOR A TRIAL COURT TO TERMINATE HER PARENTAL RIGHTS AND TO GRANT PARENTAL RIGHTS TO A THIRD PARTY COUPLE WITHOUT CONDUCTING AN EVI-

DENTIARY HEARING WITH NOTICE ON THE BEST INTERESTS OF THE CHILD.

Given the petitioner Jodie Denise Paul's inarguable parental rights as the natural mother, and assuming for the sake of argument only that the third-party respondents may have had some constitutionally cognizable parental interest concurrent with the natural mothers' parental rights, it would nonetheless be incumbent upon the lower court at a bare minimum to have held an evidentiary hearing regarding the best interests of the child.

Under Georgia law, "[i]n an initial contest between the parents over the custody of a minor child, *the sole question to be determined is what is the best interest of the child [Emphasis provided.]"* McConaughey, *Ga. Divorce, Alimony and Child Custody* (1991 Ed.) § 24-1, *citing Gambrell v. Gambrell,* 244 Ga. 178, 259 S.E.2d 439 (1979); O.C.G.A. § 19-9-3(a) (GCA § 74-107); *Rigdon v. Rigdon,* 222 Ga. 679, 151 S.E.2d 712 (1966) [divorce]; *Dyche v. Dyche,* 218 Ga. 833(1), 131 S.E.2d 104 (1963) [habeas corpus]; *Parr v. Parr,* 196 Ga. 805, 27 S.E.2d 687 (1943) [habeas corpus]; *Mock v. Mock,* 258 Ga. 407, 369 S.E.2d 255 (1988) [divorce]. As to making a determination of parental interest, a judge must hear evidence from both parties regarding the disposition which would be in the child's best interest. *Mitchell v. Ward,* 231 Ga. 671, 203 S.E.2d 484 (1974).

In a perfect world, a trial court could presume that any adult couple who have vested parental rights and who have spent substantial time with a child would be fit to serve as caring and humane parents. Unfortunately, the world is not always so perfect as it appears at first blush,

particularly for a child who has been subject to cruel and continual violent abuse. That is precisely why a full evidentiary hearing with notice on "the best interest of the child" is an imperative requirement where two parties parental rights coexist and there is a dispute between those parties to custody.

By seeking to avoid a hearing on even the threshold matter of parental rights, the respondents in effect sought to endrun an evidentiary hearing on the custody matter concerning the "best interest of the child." Such an evidentiary hearing, like that for determining the existence of parental rights, must be set with notice. Otherwise, it too infringes the petitioner's due process guarantees. The actual reason for the Moore's harried attempt to preclude any court from reaching and examining the facts related to the best interest of the child has become readily apparent in light of the scores of sworn statements by neighbors and former neighbors of the Moores, who even prior to this lawsuit being filed had *reported the Moore's child abuse to the military police on multiple occasions.*[6] One can

[6] Edith Moore's physical violence was not restricted simply to Ms. Paul's natural child, but also included at least one assault upon another child in her neighborhood which resulted in *criminal charges* being brought against her. R-622, Exhibit C; *see also* Appellant's First Response to Motion to Dismiss, Appendix A, Affidavit of Sandra Cline. The horrible physical violence visited upon Ms. Paul's natural son by appellee Edith Moore include occasions where she would *strike him in the face with her hand hard enough to knock the then four-and-a-half year old child off his feet, beat him repeatedly with a broom stick hard enough to leave lasting bruises, and jerk him up by the arm hard enough to dislocate his shoulder.* R-622; *see also* Appellant's First Response to Motion to Dismiss, Appendix A, Exhibits A-F, Affidavits In Support of "Extraordinary Custody Motion Based Upon Newly Discovered Evidence Showing Abuse of Child By Edith Moore." Typically, when the beatings would take place indoors or begin outdoors with the child being then drug indoors, the neighbors could hear the *child screaming over the audible blows "No, Mommy, No."*

imagine how difficult it must have been for these neighbors themselves to come forward on their own to bear witness on behalf of an abused eight year old child and to testify about Edith Moore's severe and ongoing physical, verbal and emotional abuse of Ms. Paul's son.

Were it necessary for this Court to reach the issue of the best interest of the child in this action, the due process safeguards require an evidentiary hearing with notice. The absence of such a hearing leaves the state court orders fatally defective. The Court in *Stanley* noted that "[p]rocedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand." *Stanley* at 656 and 657.

Id. As noted, the child abuse was reported by the neighbors to the military police on multiple occasions. *Id.* The verbal abuse included not only continual threats of violence, but also cruel and dehumanizing names she would call him such as "a little bastard", "a little son of a bitch", and "a fucking ass". *Id.* Edith Moore also told the child then in her custody that *"I hate you"*, she *"didn't want him anymore"*, and that she was *"going to take Melvin and trade him for the little boy she was supposed to have gotten."* *Id.*

III. CONCLUSION

For the foregoing reasons, petitioners respectfully pray that a writ of certiorari issue to review the decision of the Georgia Supreme Court in this case.

Respectfully submitted

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September 30, 1992

APPENDIX A

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

EUGENE MOORE AND	)	
EDITH MOORE,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION FILE
	)	NUMBER: D-85627
GRIFFIN SPALDING COUNTY	)	
HOSPITAL AUTHORITY d/b/a	)	
GRIFFIN SPALDING	)	
HOSPITAL, et al.,	)	
Defendants	)	
and	)	
Third-Party Plaintiffs	)	
vs.	)	
	)	
JODIE DENISE POPE and	)	
WALTER KEITH POPE,	)	
Third-Party Defendants.	)	

ORDER

Plaintiffs' motion to dismiss Third Party Defendant Jodie Denise Pope's cross-claim came before this Court for consideration pursuant to Rule 6, Uniform Superior Court Rules.

Plaintiffs submitted themselves to the jurisdiction of this Court by filing the above styled action and by doing so permitted any mandatory or permissive counterclaim or cross-claim that could be asserted by any party. The fact that Third Party Defendant Jodie Denise Pope's cross-claim against the Plaintiffs does not arise out of tort or

contract makes it a permissive claim and such is not precluded because it differs in nature from the original action as such cross-claim does arise out of the same transaction and occurrence. Since the Plaintiffs have submitted themselves to the jurisdiction of this Court, service of a cross-claim on their attorney of record is sufficient service and there is no requirement for them to be served personally with such cross-claim.

Plaintiffs also have raised the issue that such cross-claim should be dismissed because of two prior pending cases, one in the Hardin Circuit Court, State of Kentucky, and the other in the Superior Court of Spalding County, Georgia.

O.C.G.A. § 9-2-5(1), which prohibits the prosecution of two simultaneous actions for the same cause against the same party, applies only to dual actions filed within courts of this State. In raising the defense of a prior pending action to determine custody, the Court must determine that in the prior pending suit the Court has jurisdiction over the person or that they have submitted themselves to the jurisdiction of this Court. The Popes have no basis to obtain inpersona jurisdiction over the Moores who are residents of Kentucky to contest custody in Spalding County unless the parties consent to such jurisdiction. If Spalding County lacks the jurisdiction over the parties, such prior pending action would not abate this action. However, this Court will stay Defendant Jodie Denise Pope's cross-claim until it can be determined if Spalding County has proper jurisdiction over the parties.

Plaintiffs obtained custody of the minor child Melvin Eugene Moore pursuant to an adoption which took place in the State of Georgia. The Uniform Child Custody

Jurisdiction Act, O.C.G.A. § 19-9-40 et seq., would apply only to such a custody dispute where the custodial parents have custody by a valid judgment. In order for the Uniform Child Custody Jurisdiction Act to apply, the Court must decide if the Moors have a right to legal custody of the minor child. If the Court determines that the Moores did not have a right to legal custody of the minor child then such child would have been taken out of the State illegally, even if it was done in good faith, and Kentucky could not be the home state of the minor child under the Uniform Child Custody Jurisdiction Act. In order for Kentucky to be the home state of the minor child, the adoptive parents must have lawful custody of the child and if the Court finds the adoption is void ab initio the Moores would not have legal custody of the minor child and would be strangers in the eyes of the law.

The only state that can determine custody of the minor child now known as Melvin Eugene Moore is the State of Georgia as the questions of the rights, duties and powers of the natural parents, the adoptive parents and the State can only be adjudicated in Georgia, the state in which such adoption took place. Furthermore, the Finding of Fact, conclusion of Law and report issued by the Honorable Thomas H. Hadley, domestic Relations Commissioner, Hardin Circuit Court, state of Kentucky, shows the State of Kentucky feels it lacks jurisdiction to deal with such custody matters.

Since this proceeding does not come within the Uniform Child Custody Jurisdiction Act, the third Party defendant Jodie Denise Pope would not be required to file the affidavit required under O.C.G.A. § 19-9-49 with her cross-claim.

Plaintiffs' request for attorneys fees and expenses under O.C.G.A. § 19-9-47(g) are denied.

For the foregoing reasons, the Court denies Plaintiffs' motion.

SO ORDERED THIS 31st day of July, 1991.

FRANK M. ELDRIDGE, Judge
Fulton Superior Court
Atlanta Judicial Circuit

APPENDIX B

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JODIE DENISE POPE,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION FILE
	)	NUMBER: D-80775
GEORGIA STATE DEPT. OF	)	
HUMAN RESOURCES,	)	
GEORGIA DIVISION OF FAMILY	)	
AND CHILDREN SERVICES,	)	
SPALDING COUNTY	)	
DEPARTMENT OF FAMILY	)	
AND CHILDREN SERVICES,	)	
WARE COUNTY DEPARTMENT	)	
OF FAMILY AND CHILDRENS	)	
SERVICES, JAMES G. LEDBETTER,	)	
SHIRLEY A. TATE, L. PATRICIA	)	
JOHNSON, DOUGLAS G.	)	
GREENWELL, CAROL DINGLER,	)	
WILLIAM M. DENTON, JANICE	)	
L. MADDOX, HENRIETTA	)	
LOVETT, SUE DOE, JANE DOE,	)	
JOHN DOE,	)	
Defendants	)	

WALTER KEITH POPE,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION FILE
	)	NUMBER: D-80852
GEORGIA STATE DEPT. OF	)	
HUMAN RESOURCES,	)	
GEORGIA DIVISION OF FAMILY	)	

AND CHILDREN SERVICES,)
SPALDING COUNTY)
DEPARTMENT OF FAMILY AND)
CHILDREN SERVICES, WARE)
COUNTY DEPARTMENT OF)
FAMILY AND CHILDRENS)
SERVICES, JAMES G. LEDBETTER,)
SHIRLEY A. TATE, L. PATRICIA)
JOHNSON, DOUGLAS G.)
GREENWELL, CAROL DINGLER,)
WILLIAM M. DENTON, JANICE)
L. MADDOX, HENRIETTA)
LOVETT, SUE DOE, JANE DOE,)
JOHN DOE,)
Defendants)

EUGENE MOORE AND)
EDITH MOORE,)
Plaintiffs,)
vs.) CIVIL ACTION FILE
) NUMBER: D-85627

GRIFFIN SPALDING COUNTY)
HOSPITAL AUTHORITY d/b/a)
GRIFFIN SPALDING HOSPITAL,)
VICKIE VAUGHN, LOIS)
SHIRAH, JANE DOE, GEORGIA)
DEPARTMENT OF HUMAN)
RESOURCES, GEORGIA)
DIVISION OF FAMILY AND)
CHILDREN SERVICES,)
SPALDING COUNTY)
DEPARTMENT OF FAMILY)
AND CHILDREN SERVICES,)
WARE COUNTY DEPARTMENT)

OF FAMILY AND CHILDREN)
SERVICES, JANICE L. MADDOX,)
HENRIETTA LOVETT and)
SUE DOE,)
Defendants and)
Third-Party Plaintiffs)
vs.)
)
JODIE DENISE POPE and)
WALTER KEITH POPE,)
Third-Party Defendants.)

RULE NISI

The Court orders all parties in the above styled cases to be and appear on September 11, 1991, at 9:30 A.M. in Court room 611, of the Fulton County Superior Court to show cause and determine:

(1) Whether or not Spalding County Superior Court has personal jurisdiction over the parties, i.e., the Moores, the Popes and the Department of Human Resources to determine the issue of whether or not the Final Judgment and Decree of Adoption of the minor child known as Melvin Eugene Moore is a valid judgment and if such judgment should be set aside and whether such issue was first raised in Spalding County Superior Court or in Fulton County Superior Court;

(2) Whether or not Spalding County Superior Court has made a determination if such Court has personal jurisdiction over all the necessary parties and if so what is such determination and if Spalding County has not made such determination, if Fulton County has personal jurisdiction over the parties to determine the issue of whether

or not the Final Judgment and Decree of Adoption of the minor child known as Melvin Eugene Moore is a valid judgment and if such judgment should be set aside;

(3) If Spalding County does have personal jurisdiction over the parties and such cause of action was filed first in Spalding County, whether or not the parties want to litigate such issues in Spalding County, Georgia, or in Fulton County, Georgia;

(4) If the Court determines that personal jurisdiction is proper in Fulton County, Georgia, and that such issues were not first raised in another Court which has personal jurisdiction over the parties or if the parties, by consent, confer personal jurisdiction on this Court for determination of the validity of the Final Judgment and Decree of Adoption of the minor child known as Melvin David Moore.

SO ORDERED this 2 day of August, 1991.

FRANK M. ELDRIDGE, Judge
Fulton Superior Court
Atlanta Judicial Circuit

APPENDIX C

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

EUGENE MOORE AND	)	
EDITH MOORE,	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION NO.
	)	D85627
GRIFFIN SPALDING COUNTY	)	
HOSPITAL AUTHORITY d/b/a	)	
GRIFFIN SPALDING HOSPITAL,	)	
VICKIE VAUGHN, LOIS	)	
SHIRAH, JANE DOE, GEORGIA	)	
DEPARTMENT OF HUMAN R	)	
ESOURCES, GEORGIA DIVISION	)	
OF FAMILY AND CHILDREN	)	
SERVICES, SPALDING COUNTY	)	
DEPARTMENT OF FAMILY	)	
AND CHILDREN SERVICES,	)	
WARE COUNTY DEPARTMENT	)	
OF FAMILY AND CHILDREN	)	
SERVICES, JANICE L. MADDOX,	)	
HENRIETTA LOVETT and	)	
SUE DOE,	)	
Defendants and	)	
Third-Party Plaintiffs	)	
	)	
vs.	)	
	)	
JODIE DENISE POPE and	)	
WALTER KEITH POPE,	)	
Third-Party Defendants.	)	

ORDER

Within ten (10) days from the date of this Order, the Georgia Department of Human Resources shall produce to the plaintiffs the entire file relating to the adoption, custody, and foster care of the child now known as *Melvin Eugene Moore*, excluding work-produce and attorney/client privileged information.

The documents produced pursuant to this Order may be viewed only by counsel, by the plaintiffs and by expert witnesses retained by counsel. In addition, should lay witnesses by deposed or interviewed, the witnesses may be questioned about these documents or about information contained in these documents. Such witnesses will be provided with a copy of this Order and instructed as to the confidentiality of said documents.

All depositions using the documents subject to this Order, or which refer specifically to said documents, shall be filed with the Clerk of Court under seal until further order of the Court. In the event that the parties find it necessary to file any of the aforesaid documents, or parts thereof, with the Court, or to quote from said documents, said documents or pleadings shall be filed under seal and shall not be open to the public for inspection and copying until further order of the Court.

IT IS FURTHER ORDERED that all counsel and parties have agreed not to communicate with the press concerning information contained in the produced documents except to the extent that this information is obtained independently or is already of record in the Court.

Upon motion of either party for further consideration of matters contained in this Order, the Court will set

a hearing date for an *in camera* inspection to determine which, if any, of the documents produced merit continued coverage by a protective order.

SO ORDERED this 15th day of August, 1991.

FRANK M. ELDRIDGE, JUDGE
Fulton County Superior Court

PRESENTED TO:

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Remar & Graettinger, P.C.
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Attorney for Defendants
Georgia DHR, et al

CONSENTED TO:

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(404) 227-0110
Attorney for Plaintiffs

APPENDIX D

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JODIE DENISE POPE,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION FILE
	)	NUMBER: D-80775
GEORGIA STATE DEPT. OF	)	
HUMAN RESOURCES,	)	
GEORGIA DIVISION OF FAMILY	)	
AND CHILDREN SERVICES,	)	
SPALDING COUNTY	)	
DEPARTMENT OF FAMILY AND	)	
CHILDREN SERVICES, WARE	)	
COUNTY DEPARTMENT OF	)	
FAMILY AND CHILDRENS	)	
SERVICES, JAMES G. LEDBETTER,	)	
SHIRLEY A. TATE, L. PATRICIA	)	
JOHNSON, DOUGLAS G.	)	
GREENWELL, CAROL DINGLER,	)	
WILLIAM M. DENTON, JANICE	)	
L. MADDOX, HENRIETTA	)	
LOVETT, SUE DOE, JANE DOE,	)	
JOHN DOE,	)	
Defendants	)	
---	---	---
WALTER KEITH POPE,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION FILE
	)	NUMBER: D-80852
GEORGIA STATE DEPT. OF	)	
HUMAN RESOURCES,	)	
GEORGIA DIVISION OF FAMILY	)	

AND CHILDREN SERVICES,)
SPALDING COUNTY)
DEPARTMENT OF FAMILY AND)
CHILDREN SERVICES, WARE)
COUNTY DEPARTMENT OF)
FAMILY AND CHILDRENS)
SERVICES, JAMES G. LEDBETTER,)
SHIRLEY A. TATE, L. PATRICIA)
JOHNSON, DOUGLAS G.)
GREENWELL, CAROL DINGLER,)
WILLIAM M. DENTON, JANICE)
L. MADDOX, HENRIETTA)
LOVETT, SUE DOE, JANE DOE,)
JOHN DOE,)
Defendants)

EUGENE MOORE AND)
EDITH MOORE,)
Plaintiffs,)
)
vs.) CIVIL ACTION FILE
) NUMBER: D-85627

GRIFFIN SPALDING COUNTY)
HOSPITAL AUTHORITY d/b/a)
GRIFFIN SPALDING HOSPITAL,)
VICKIE VAUGHN, LOIS SHIRAH,)
JANE DOE, GEORGIA)
DEPARTMENT OF HUMAN)
RESOURCES, GEORGIA)
DIVISION OF FAMILYAND)
CHILDREN SERVICES,)
SPALDING COUNTY)
DEPARTMENT OF FAMILY)
AND CHILDREN SERVICES,)
WARE COUNTY)

DEPARTMENT OF FAMILY AND)
CHILDREN SERVICES, JANICE L.)
MADDOX, HENRIETTA LOVETT)
and SUE DOE,)
Defendants and)
Third-Party Plaintiffs)
)
vs.)
)
JODIE DENISE POPE and)
WALTER KEITH POPE,)
Third-Party Defendants.)

RULE NISI

The Court hereby sets aside its order entered August 8, 1991, setting a Rule Nisi hearing for September 11, 1991, at 9:30 A.M. and enters the following orders:

The Court orders all parties in the above styled cases to be and appear on October 3, 1991, at 9:30 A.M. in Court room 611, of the Fulton County Superior Court to show cause and determine:

(1) Whether or not Spalding County Superior Court has personal jurisdiction over the parties, i.e., the Moores, the Popes and the Department of Human Resources to determine the issue of whether or not the Final Judgment and Decree of Adoption of the minor child known as Melvin Eugene Moore is a valid judgment and if such judgment should be set aside and whether such issue was first raised in Spalding County Superior Court or in Fulton County Superior Court;

(2) Whether or not Spalding County Superior Court has made a determination if such Court has personal ju-

risdiction over all the necessary parties and if so what is such determination and if Spalding County has not made such determination, if Fulton County has personal jurisdiction over the parties to determine the issue of whether or not the Final Judgment and Decree of Adoption of the minor child known as Melvin Eugene Moore is a valid judgment and if such judgment should be set aside;

(3) If Spalding County does have personal jurisdiction over the parties and such cause of action was filed first in Spalding County, whether or not the parties want to litigate such issues in Spalding County, Georgia, or in Fulton County, Georgia;

(4) If the Court determines that personal jurisdiction is proper in Fulton County, Georgia, and that such issues were not first raised in another Court which has personal jurisdiction over the parties or if the parties, by consent, confer personal jurisdiction on this Court for determination of the validity of the Final Judgment and Decree of Adoption of the minor child known as Melvin David Moore.

SO ORDERED this 22 day of August, 1991.

FRANK M. ELDRIDGE, Judge
Fulton Superior Court
Atlanta Judicial Circuit

APPENDIX E

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JODIE DENISE POPE, Plaintiff,	)	
vs.	)	CIVIL ACTION FILE
	)	NUMBER: D-80775
GEORGIA STATE DEPT. OF HUMAN RESOURCES, GEORGIA STATE DIV. OF FAMILY AND CHILDREN SERVICES, SPALDING COUNTY DEPT. OF FAMILY AND CHILDREN SERVICES, WARE COUNTY DEPT. FAMILY AND CHILDREN SERVICES, JAMES G. LEDBETTER, SHIRLEY A. TATE, PATRICIS [sic] L. JOHNSON, DOUGLAS G. GREENWELL, CAROL R. DINGLER, WILLIAM M. DENTON, JANICE L. MADDOX, and HENRIETTA LOVETT, Defendants	)	
WALTER KEITH POPE, Plaintiff,	)	
vs.	)	CIVIL ACTION FILE
	)	NUMBER: D-80852
GEORGIA STATE DEPT. OF HUMAN RESOURCES, GEORGIA STATE DIV. OF FAMILY AND CHILDREN	)	

SERVICES, SPALDING)
COUNTY DEPT. OF FAMILY)
AND CHILDREN SERVICES,)
WARE COUNTY DEPT. FAMILY)
AND CHILDREN SERVICES,)
JAMES G. LEDBETTER, SHIRLEY)
A. TATE, PATRICIA L.)
JOHNSON, DOUGLAS G.)
GREENWELL, CAROL R.)
DINGLER, WILLIAM M.)
DENTON, JANICE L. MADDOX,)
and HENRIETTA LOVETT,)
Defendants)

EUGENE MOORE AND)
EDITH MOORE,)
Plaintiffs,)
)
vs.) CIVIL ACTION FILE
) NUMBER: D-85627
GRIFFIN SPALDING COUNTY)
HOSPITAL AUTHORITY d/b/a)
GRIFFIN SPALDING HOSPITAL,)
VICKIE VAUGHN, LOIS SHIRAH,)
GEORGIA STATE DEPT. OF)
HUMAN RESOURCES,)
GEORGIA STATE DIV. FAMILY)
AND CHILDREN SERVICES,)
SPALDING COUNTY DEPT.)
FAMILY AND CHILDREN)
SERVICES, WARE COUNTY)
DEPT. FAMILY AND CHILDREN)
SERVICES, JANICE L. MADDOX)
and HENRIETTA LOVETT,)
Plaintiffs,)

vs.)
)
JODIE DENISE POPE and)
WALTER KEITH POPE,)
Third-Party Defendants.)

ORDER

I

JURISDICTION

This Court has personal jurisdiction over all the parties which includes the Popes and the Moores. The Moores have submitted themselves to the jurisdiction of this Court by making a general appearance to assert their claims and the Popes have been joined individually by third-party action and have brought countersuit for custody against the Moores.

The Uniform Interstate Custody Act, O.C.G.A. § 19-9-40 et seq., does not apply because the validity of the judgment of adoption is being attacked collaterally, and the present custody order of the Moores' depends upon the presumptive validity of the adoption.

Mrs. Pope can collaterally attack the judgment of adoption rather than seek to set aside the judgment under O.C.G.A. § 9-11-60(b) because she is the natural parent of the minor child; her parental rights have never been statutorily or constitutionally terminated, and the judgment neither under the doctrines of res judicata, collateral estoppel or estoppel by judgment, bind her since she was neither a party nor privy and had no notice of such action.

No action is now pending before a Georgia trial court seeking to determine the custody of the minor child.

Mrs. Pope commenced her action to regain her son as soon as she discovered or reasonably could have discovered that he son had been switched at birth. Neither the equitable doctrine of laches nor any statute of limitations bars this action to regain custody or the Pope child by birth.

II

RATIONALE

Freedom constitutes the bedroom of this Republic. The fundamental duty of government must be the protection of its citizens in their "...life, liberty and pursuit of happiness."[1] "Protection to person and property is the paramount duty of government and shall be impartial and complete."[2] Human rights or personal liberties evolved at common law from property rights.[3] At common law, property rights had the greatest legal protection as a personal right; human rights developed only in a system of legal rights that safeguarded a person's rights to property.

Locke, Voltaire and Rousseau influenced Thomas Jefferson, Benjamin Franklin, Samuel Adams and the other framers of both the Declaration of Independence

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[1] *Declaration of Independence;* see also Preamble, constitution of the United States of America.

[2] Art. I, Sec. I. Par. II, 1983 Constitution of Georgia; Art. I, Sec. II, Par. III of the 1976 Constitution of Georgia.

[3] Holmes, *The Common Law;* Lerner, *The Mind and Faith of Justice Holmes,* Random House, Inc., (N.Y., 1948).

and The Constitution of the United States. Certain fundamental and inalienable rights have been given to all citizens as human rights. These human rights evolved in the conceptualization of the 17th and 18th century political thinkers from property rights and found clear expression in the Declaration of Independence and in the Bill of Rights. Whether such rights derive from natural law or from a social compact of the governed, such rights became guaranteed in the Constitution.

The Jeffersonian concept of human rights has clear expression through "The powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively *or to the people*."[4] The Bill of Rights protects the people from unauthorized and unreasonable intrusion into their lives by any government. The right of privacy from government invasion comes within such reserved right by necessity and exists as a pneumbra [sic] right derived from the First, Third, Fourth, Fifth and Ninth Amendments.[5]

Constitutional privacy rights have been found to exist by implicit expression in the Georgia Constitution as well.[6] The protection of citizens by the State "....in the full

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[4] Tenth Amendment, The Constitution of the United States.

[5] *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); see also dissent by Justice Douglas in *Poe v. Ullman*, 367 U.S. 497, 509-521 (1961); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942).

[6] *Jefferson v. Griffin &c. Hosp. Auth.*, 247 Ga. 86, 274 S.E.2d 457 (1981); *Zant v. Prevatte*, 248 Ga. 832, 266 S.E. 2d 715 (1982); *In re: L.H.R.*, 253 Ga. 439, 446, 321 S.E.2d 716 (1984); *State of Ga. v. McAfee*, 259 Ga. 579, 385 S.E.2d 651 (1989); *Kirby v. Spivey*, 167 Ga. App. 751, 753(2), 307 S.E.2d 538 (1983).

enjoyment of the rights, privileges, and immunities due to such citizenship," has such broad ambit as to encompass the privilege of privacy from unwarranted state intrusion.[7]

Parents have a legally protected interest in the birth of progeny.[8]

The family constitutes the basic unit of society. Preservation of the family is necessary to protect society. At common law, the familial relationship had protection as a property right because such analysis afforded the highest protection under such analysis; when human rights developed and received higher protection when balanced against property rights, familial relations required a human rights analysis. Family relationships represent a complex bundle of human rights which, unlike property rights, intertwine, grow together and branch off without neat separability. Absent the family, society cannot properly socialize, educate, inculcate, motivate and nurture the infant to become a mature, moral, productive individual. Totalitarian societies from Sparta, the Third Reich, and the Soviet Union have tried and failed to replace the family with the State.

Basic to the family must be the minor child. Until the minor child approaches majority, the child has no individual civil and constitutional rights that can be asserted

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[7] Art. I, Sec. I, Par. VII, The 1983 Constitution of Georgia; see also Art. I, Sec. II, Par IX, The 1976 Constitution of Georgia

[8] *Atlanta Ob. & Gyn. Group v. Abelson*, 195 Ga. App. 274, 392 S.E.2d 916 (1990), see also *Fulton-DeKalb Hosp. Auth. v. Graves*, 252 Ga. 441, (314 S.E.2d 653 (1984); *Azzolino v. Dingfolder*, 337 S.E. 2d 528 (NC, 1985); *Wilson v. Kuenzi*, 751 S.W.2d 741 (MO, 1988); *Smith v. Cote*, 513 A.2d 341, 347 (N.H., 1986)

either against the parent, someone in loco parentis or society. The parents, by the pneumbra of their constitutional and civil rights, protect the minor child from others. The parents exercise religion and speech extent to the minor. If the minor seeks to exercise independent freedom of speech or from search and seizure against a *parens patriae*, i.e., a school, when the parents have no involvement, then such right has no protection as a constitutional right.[9] The parent has a natural or fundamental right in the relationship with the child,

> "...bone of my bone, flesh of my flesh."[10]
> If the right of privacy means anything, it is the right of the *individual*, married or single to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[11]

It logically follows that if individuals have a constitutionally protected privacy interest in whether or not to have a child, such same constitutionally protected privacy interest protects the relationship between the parent and child, once born, as a human right superior to any common law rights or interests.

Progeny provide parents with posterity so that the person can preserve their identity, tradition, and existence. The child may be a vital aspect of the parent's religion. Parenting permits a person to mature, sacrifice, love,

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[9] *Hazelwood School Dist., et a. v. Kuhlmeir*, 484 U.S. 260, 108 X.C. 562 (1988); *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.C. 733, 83 L.Ed.2d 720 (1985)

[10] *Supra* at note 8

[11] *Eisenstadt v. Baird, supra* at p. 453.

share and grow. Parenting holds endless opportunities in the relationship for both the parent and child. The right to choose to assume such part in creation is a fundamental civil right.[12]

Barren couples, same sex couples and single adults, seek the opportunity to parent through adoption. Fees and expenses of twenty thousand dollars to adopt in Georgia from private agencies have become common. Private agencies search Asia, Eastern Europe and South and Central America for children to fill the demand for adoptable children. Even AIDS, retarded and handicapped children fill the needs to parent of single adults.

The State of Georgia has chosen to take State action to regulate, to approve and to supervise adoptions. The State licenses private agencies to place children. The State, through the Family and children services of the Department of Human Resources, screens and approves most adoptions and, as in this case, actually places the child for adoption. The Court, for the State, carries out the final adoption by terminating parental rights and granting an adoption decree changing the legal relationship of the parties and the child.

The State has a compelling interest in the adoption of orphans and unwanted, neglected or abused minors. The State has a vital interest in the health, welfare, morals, safety and education of all minors and the status of a minor. Making them eligible for adoption also places them at risk regarding proper health, welfare, education, morals and safety. Unless such minors receive proper care and nurture, they may fail to grown into mature productive

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[12] *Supra*, note 5

citizens and instead become liabilities to society as antisocial, addictive, dependent, mentally ill or non-productive. Through adoption, the minor may achieve a stable home environment where he can receive the love, nurture and care that will make it more probable that the child will become a normal mature adult, both physically and psychologically. If the State fails to place unwanted minors for adoption, it has the burden, both financially and developmentally, of raising the minor; to carry out such responsibility means either institutionalization or foster care Both methods of rearing children have risks for the child of a traumatic nature, both physically and psychologically. A disproportionate number of psychopaths, sociopaths, and abusers, both physically and sexually, come from individuals who were raised, in whole or in part, either in institutions or foster care. Another consideration of a lesser State interest lies in affording the opportunity to parent, by adoption, to those the State, by reasonable criteria, finds are qualified to rear, nurture and care for a minor.

Adoption laws have been passed and amended that make it easier and easier to adopt in less time. The early adoption statute in Gerogia [sic] required six months and two court hearings before the adoption became final.[13] The notice and hearing to place temporary custody occurred no less than 75 days after the petition had been filed.[14] Such liberalization of the adoption standards caused "without justifiable cause"[15] to be eliminated from the termination of a parent's rights in a step-parent adoption on the

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[13] Ga. Law 1941, pp. 300, 305, Sec. 11

[14] Id., p. 302, Sec. 5

[15] Ga. L. 1972, pp. 201, 211, Sec. 1, Sec. 74-405(a)(1)(2)

grounds of failure "to communicate" or "to provide for the care and support" for one year or more;[16] this code section was declared unconstitutional as violating due process of law by denying the parent the opportunity to show the reason for such failure.[17] Those who lobbied for passage or amendment of adoption laws have ignored and not adequately safeguarded the rights of natural or putative parents in the termination of parental rights. Fraud and duress in obtaining parental consent, mistake in the identity of the child to be adopted, and inadequacy of notice to a parent or putative parent have not been dealt with adequately by the adoption statutes. The Courts have had to fashion remedies and procedures to fill statutory gaps in adoption.[18]

Since constitutional rights of both parents or the birth mother and putative biological father are involved, notice and an opportunity to be heard prior to termination of the parental right is essential as a matter of procedural and substantive due process under both the Fifth and Fourteenth Amendments of the Constitution of the United States[19] and Article I, Section I, Par. I, of the 1983

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[16] Ga. L. 1979, p. 1182 , Sec. 5

[17] *Thorne v. Padgett*, 259 Ga. 650, 386 S.E.2d 155 (1989)

[18] *In re Baby Girl Eason*, 257 Ga. 212, 358 S.E.2d 459 (1987); *Duncan v. Harden*, 234 Ga. 204, 214 S.E.2d 890 (1975); *Wellfort v. Bowick*, 147 Ga. App. 565, 249 S.E.2d 363 (1978); *Downs v. Wortman* 228 Ga. 315, 184 S.E.2d 387 (1971); *Smith v. Finstad*, 247 Ga. 603, 277 S.E.2e 736 (1981); *Chandler v. Cochran*, 247 Ga. 184, 275 S.E.2d 23 (1981); *In re White*, 254 Ga. 678, 333 S.E.2d 588 (1985); *Thorne v. Padgett*, 259 Ga. 650, *supra; McDonald v. Hester*, 115 Ga. App. 740, 155 S.E.2d 720 (1967); *Drummond v. Fulton County Dept. of Family and Children Serv.*, 547 F.2d 835 (5th Cir.) on rehearing 56 3 F.2d 1200 (5th Cir., 91977) cert. denied 437 U.S. 910, 98 S.Ct. 3103, 57 L.Ed.2d 1141 (1978).

[19] *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Quillian v. Walcott*, 434 U.S. 246, 546 L.Ed.2d 511, 98 S.Ct. 549 (1978);

Constitution of Georgia.[20] Procedures for surrender of or termination of parental rights require strict construction against the adoption and in favor of the parent.[21] Before an adoption can become legal, the consent of the parents or the abandonment and termination of their parental rights must occur.[22] Adoption did not exist at common law, thus it is a creature of statute.[23]

In this case, all legal steps necessary to effectuate a *de jure* adoption have meet met, including the proper termination of the parental rights of the baby boy to be adopted by the Moores. However, the subject of the adoption was switched with the Pope's baby so that the Moores received the Pope baby, and the Popes received the baby boy to be adopted by the Moores. The legal adoption steps and court action were completed so that the Moores believed that they had a *de jure* adoption of the proper child. The Court went through a three-step decision-making to determine: first, if the parents consented; second, are the adopting parents worthy and able to care for the child; and

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Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979); *Lehr v. Robertson*, 463 US. 248, 103 S.Ct. 2985 77 L.Ed.2d 614 (1983); *Michael H. & Victoria D. v. Gerald D.*, U.S. , 109 S.Ct. 2333 (1989)

[20] *In re Baby Girl Eason*, 276 Ga. 292, *supra*.

[21] *Johnson v. Smith*, 251 Ga. 1, 302 S.E.2d 542 (1983); *Thorne v. Padgett*, 259 Ga. 650, *supra* at 17, *Nelson v. Taylor*, 244 Ga. 657, 261 S.E.2d 579 (1979)

[22] *Roberts v. Muscogee County Dept. Family and Children Serv.*, 150 Ga. App 750, 258 S.E.2d 689 (1979) *Owens v. Griggs*, 151 Ga. App. 730, 261 S.E.2d 463 (1979); *Spires v. Bittick*, 171 Ga. App. 914, 321 S.E.2d 407 (1984); *Ritchie v. Dillon*, 103 Ga. App. 7, 118 S.E.2d115 (1961); *Wojciechowski v. Allen*, 238 Ga. 566, 234 S.E.2d 325 (1977); *Ellis v. Woods*, 214 Ga. 105, 103 S.E.2d 297 (1958).

[23] *Johnson v. Eidson*, 235 Ga. 820, 221 S.E.2d 813 (1976)

third, is the adoption is the best interest of the child.[24] All parties and the Court operated on a mistake of law and fact as to the identity of the adopted child. Thus, the adoption is a *de facto* adoption, good against the entire world except the natural or biological parents, the Popes, whose rights had not even been attempted to be terminated; and no grounds for termination existed then or now. the Popes, as the natural parents, possess and retain all the rights, duties and responsibilities of paternity. Mrs. Pope is the biological, natural and lawful mother of this child.

For over eight years the Moores have loved, nurtured and reared the boy as their own son. Until the Popes discovered they had a boy who was not their biological son, the Moores, in law and in fact, exercised legal paternity which is equivalent in law to the birth of the child.[25] They have given freely of their time, emotions and material possessions to support this boy as their son. To the boy and to the Moores there exists a bonding and familial relationship that no court ruling can undo. This child's identity and self concept has developed from the familiar relationship with the Moores. The Moores have fought to protect and to shield their son, and he has sought refuge within the pneumbra of their civil rights and their right to privacy. In the creation of this relationship, the Moores must be held blameless. They have developed human rights and property interests in the adopted boy under color of law through a *de facto* adoption. They were granted parental rights by the State of Georgia and have

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[24] *Allen v. Morgan*, 75 Ga. App. 738, 44 S.E.2d 500 (1947); *Herrin v. Graham*, 87 Ga. App. 291, 73 S.E.2d 572 (1952)

[25] *Mulligan v. Mulligan*, 201 Ga. 444, 39 S.E.2d 699 (1946); *Thornton v. Anderson* 207 Ga. 714, 6 4 S.E.2d 186 (1951); *Warner v. First Nat's Bank*, 242 Ga. 661, 251 S.E.2d 511 (1978)

acted *in loco parentis* for the entire life of the boy. The boy's privacy rights and expectations have been shrouded by the Moores' rights rather than the Popes' who have never had physical custody after the boy left the hospital.

While the Popes remain the biological, natural and legal parents of this boy, the Moores, as *loco parentis* through *de facto* adoption, over eight years have developed vested constitutional privacy rights in the relationship as well that must be balanced. This situation is analogous to a divorce in which each parent has equal rights to custody, and the Court must decide the case on the basis of the best interest of the child. Where there exist conflicts in constitutional rights the Court must engage in a balancing of rights and interests.

In matters of adoption, the Court has very broad discretion.[26] The paramount concern of the Court must be the welfare and best interests of the child.[27] In balancing the respective rights of the Popes and Moores, they must stand equal and are entitled to joint custody rights of the boy. This means that all are entitled to school, medical, religious and extracurricular reports on the boy and have a voice in deciding issues concerning the health, safety, welfare, morals, religion and education of the boy. To determine visitation and custody the Court must resort to the best interest of the child test.

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[26] *McCall v. Van Popering*, 124 Ga. App. 149, 183, SE.2d 411 (1971); *Nix v. Sanders*, 136 Ga. App. 159, 223 S.E.2d 21 (1975); *Ritchie v. Dillon*, 103 Ga. App. 7, *supra; Owens v. Griggs*, 151 Ga. App. 730, *supra; Johnson v. Taylor*, 153 Ga. App. 15, 264 S.E.2d 512 (1980); *Chandler v. Cochran*, 247 Ga. 184, *supra; Cox v. Bohannon*, 86 Ga. App. 236, 71 S.E.2d 440 (1952)

[27] *Herrin v Graham*, 87 Ga. App. 291, *supra; Allen v. Morgan*, 75 Ga. App 738, *supra; Hester v. Mathis*, 147 Ga. App. 257, 248 S.E.2d 23 (1981)

The Popes have been divorced in a contested action which raised the issue of the paternity of the child that they raised. From the litigation and the divorce, it can reasonably be inferred that there still exists some tension between them. Mrs. Pope, to her credit, fought and finally won the right to adopt the only son that she has known and has reared over the last eight years. She works as a waitress to support herself and her adopted son. She lives in Griffin, Spalding County, Georgia a small city lying in the Piedmont region of central Georgia which has a mixed agricultural, mill, manufacturing, retail and service economy.

The Moores are a mixed race couple that Family and Children Services have found suitable people for adoption of a boy. They have fought long and hard to protect their adopted son on the income of a career non-commissioned officer. The significance of the mixed marriage is that they sought to adopt a child of mixed parentage and have reared the child with the identity of mixed heritage. At eight years of age, this boy has the self image and self concept of a racially mixed child in a racially mixed family. The military posts, both in the United States and abroad, have a concentration of more racially mixed families, both civilian and military, than does Griffin, Georgia; there exists greater racial tolerance and acceptance in the military than in the country as a whole. The Moores have provided a loving, nurturing and stable environment for the last eight years. The military with its direct or subsidized education provides a better educational, cultural, and developmental [sic] environment that does Griffin, Georgia. The health system provided for military dependents equals or is superior to most private health insurance plans. Mr.

Moore has provided a positive male role model, but Mrs. Pope has to act as a single parent taking on the roles of both mother and father. Being a single parent is difficult but having two males in this age range, who do not know each other, would be taxing with risks of sibling rivalry and favoritism. To adjust and cope with being uprooted from one family and dropped into another in a different environment would be traumatic and cause unreasonable anxiety, lack of structure, and identity problems for the child.

The Court finds that is in the best interest of the child to remain in the physical custody of the Moores with reasonable visitation with the Popes. As custodial parents, the Moores must consult with Mrs. Pope regarding education, health, safety, welfare, morals and development, but in the event of a conflict the Moores shall make all final decisions.

The divorce between Mr. and Mrs. Pope gave custody of the child to Mrs. Pope with visitation in Mr. Pope. The child shall visit with the Popes from June 15th until August 15th of each summer. If the Moores are living or are stationed in America, the Popes shall have as additional visitation the Spring vacation, Thanksgiving holidays and one portion of the Christmas holidays as observed by the school the child attends. In odd numbered years, Mrs. Pope shall have Christmas Day and the days observed prior to Christmas Day; in even years, Mrs. Pope shall have the day after Christmas through New Year's Day. Mr. Pope may have the first, third, fifth and seventh weekends of the summer period from 6:00 p.m. on Friday until 6:00 p.m. on Sunday.

The natural parents and the adoptive parents individually have the duty to support this minor child. The Court hereby orders that the Moores support the child by paying all his necessities, except as hereinafter provided, for the period of their custody; Mrs. Pope has the duty to pay all such necessities during the minor child's visitation with her; Mr. Pope has the duty to pay all such necessities during the minor child's visitation with him. Medical expenses shall include all expenses of health care provider whether for dental care, service or treatment by a medical physician, surgeon, osteopath, psychologist, optometrist or optician; the Moores shall pay one-half of all such expenses not covered by insurance; Mrs. Pope shall pay one-fourth of such expenses and Mr. Pope shall pay one-fourth of such expenses. the Moores shall either pay and seek medical coverage reimbursement or submit the insurance claims within thirty (30) days of the receipt of any bill; the Moores shall, within forty five (45) days after the submission of an insurance claim and it remains unpaid or it is paid within such time, submit copies of the bills and the amount to be paid to each of the Popes individually; the Popes shall remit such amount within thirty (30) days to the Moores. If, after payment by the Popes, the Moores receive an insurance reimbursement which covers costs paid by either or both of the Popes, the Moores shall remit such proportionate share of the reimbursement. The Popes each shall be liable for twenty-five percent (25%) of any educational fees, books, or tuition, extra-curricular activities, sports or camp, with the Moores paying the remainder. Mrs. Pope shall be responsible for and pay the transportation costs of the minor child for visitation as child support.

The Court finds that there exists no just reason why this order should not be immediately entered as the final judgment of this Court and orders that the Clerk enter this order as a Final Judgment.

In the event that any party files a notice of appeal, such filing of appeal shall act to stay the effect of this order until it becomes a final judgment as a matter.

SO ORDERED this 2 day of October, 1991.

FRANK M. ELDRIDGE, Judge
Fulton Superior Court
Atlanta Judicial Circuit

APPENDIX F

Case No. S92D0168

SUPREME COURT OF GEORGIA

Atlanta Nov 25, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

JODIE DENISE POPE v. EUGENE MOORE et al

From the SUPERIOR COURT of FULTON County.

Upon consideration of this Application for Discretionary Appeal, it is ordered that it is hereby denied.

All the Justices concur, except Clarke, C.J., not participating.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Lynn M. Stinchcomb, Deputy Clerk

APPENDIX G

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JODIE DENISE POPE, Plaintiff,	)	
vs.	)	CIVIL ACTION FILE
	)	NUMBER: D-80775
GEORGIA STATE DEPT. OF HUMAN RESOURCES, GEORGIA STATE DIV. OF FAMILY AND CHILDREN SERVICES, SPALDING COUNTY DEPT. OF FAMILY AND CHILDREN SERVICES, WARE COUNTY DEPT. FAMILY AND CHILDREN SERVICES, JAMES G. LEDBETTER, SHIRLEY A. TATE, PATRICIA L. JOHNSON, DOUGLAS G. GREENWELL, CAROL R. DINGLER, WILLIAM M. DENTON, JANICE L. MADDOX and HENRIETTA LOVETT, Defendants	)	
WALTER KEITH POPE, Plaintiff,	)	
vs.	)	CIVIL ACTION FILE
	)	NUMBER: D-80852
GEORGIA STATE DEPT. OF HUMAN RESOURCES, GEORGIA STATE DIV. OF FAMILY AND CHILDREN	)	

SERVICES, SPALDING COUNTY DEPT. OF FAMILY AND CHILDREN SERVICES, WARE COUNTY DEPT. FAMILY AND CHILDREN SERVICES, JAMES G. LEDBETTER, SHIRLEY A. TATE, PATRICIA L. JOHNSON, DOUGLAS G. GREENWELL, CAROL R. DINGLER, WILLIAM M. DENTON, JANICE L. MADDOX and HENRIETTA LOVETT, Defendants	)	
EUGENE MOORE AND EDITH MOORE, Plaintiffs,	)	
vs.	)	CIVIL ACTION FILE NUMBER: D-85627
GRIFFIN SPALDING COUNTY HOSPITAL AUTHORITY d/b/a GRIFFIN SPALDING HOSPITAL, VICKIE VAUGHN, LOIS SHIRAH, GEORGIA STATE DEPT. OF HUMAN RESOURCES, GEORGIA STATE DIV. FAMILY AND CHILDREN SERVICES, SPALDING COUNTY DEPT. FAMILY AND CHILDREN SERVICES, WARE COUNTY DEPT. FAMILY AND CHILDREN SERVICES,	)	

JANICE L. MADDOX and)
HENRIETTA LOVETT,)
Defendants)
vs.)
)
JODIE DENISE POPE and)
WALTER KEITH POPE,)
Third-Party Defendants.)

RULE NISI

The Court hereby orders all parties and their counsel to be and appear on December 12, 1992, at 9:00 a.m. in Courtroom 611, to show cause if the minor child known as Melvin Eugene Moore should remain in Georgia in the custody of Jodie Denise Pope pending ruling on the appeal presently before the Supreme Court of Georgia.

SO ORDERED this 3 day of December, 1991

_____

FRANK M. ELDRIDGE, Judge
Fulton Superior Court
Atlanta Judicial Circuit

APPENDIX H

S92A0450

SUPREME COURT OF GEORGIA

Atlanta February 7, 1992

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Jodie Denise Pope v. Georgia Department of Human Resources et al

From the Superior Court of Fulton County

It is ordered that this case be hereby transferred to the Court of Appeals. Clark, C.J., Weltner, P.J., Bell, Hunt, Benham and Fletcher, JJ. concur.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Lynn M. Stinchcomb, Deputy Clerk.

APPENDIX I

COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA, MARCH 10, 1992

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

A92A0938. POPE v. GEORGIA DEPARTMENT OF HUMAN RESOURCES, et al

It appearing from the record that the appeal in this case is from a child custody order, for which an application for discretionary appeal must be filed (O.C.G.A. § 5-6-35 (a) (2)), and it further appearing that an application for discretionary appeal was denied on November 25, 1991, it is hereby ORDERED that this appeal be dismissed.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta
March 10, 1992

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Victoria McLaughlin, Clerk.

APPENDIX J

COURT OF APPEALS OF THE STATE OF GEORGIA

ATLANTA, MARCH 25, 1992

The Honorable Court of Appeals met pursuant to adjournment.

The Following order was passed:

Case No. A92A0938

JODIE DENISE POPE V. GEORGIA DEPARTMENT OF HUMAN RESOURCES ET AL

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta

March 25, 1992

I certify that the above is a true exact from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.
Victoria McLaughlin

APPENDIX K

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE

ATLANTA

DATE: JULY 02, 1992

Robert H. Benfield, Jr.
Two Decatur TownCenter
Suite 425
Atlanta, GA 30030

Case No. S92C0883

JODIE DENISE PAUL V. GEORGIA DEPARTMENT OF HUMAN RESOURCES ET AL.

COURT OF APPEALS CASE NO. A92A0938

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur except Clark, J., not participating and Sears-Collins, Jr., who dissents.

Very truly yours,

JOLINE B. WILLIAMS, Clerk

Supreme Court, U.S.
FILED
OCT 27 1992
OFFICE OF THE CLERK

(2)

No. 92-582

In The

Supreme Court of the United States

October Term, 1992

JODIE DENISE PAUL,

Petitioner,

v.

EUGENE MOORE AND EDITH MOORE,

Respondents.

Petition For Writ Of Certiorari To The Georgia Supreme Court

BRIEF FOR RESPONDENTS EUGENE MOORE AND EDITH MOORE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN T. NEWTON, JR.
NEWTON & HOWELL, P.C.
127½ E. Solomon St.
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Attorneys for Respondents

*Counsel of Record

October 27, 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

LIST OF PARTIES

PARTIES

Jodie Denise Pope (now Paul)
Walter Keith Pope
Eugene Moore
Edith Moore
Georgia Department of Human Resources (and Agencies thereof)
James G. Ledbetter
Shirley A. Tate
Patricia L. Johnson
Douglas G. Greenwell
Carol R. Dingler
William M. Denton
Janice L. Maddox
Henrietta Lovett

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COUNTER-STATEMENT OF THE CASE

To briefly summarize the facts that led to the filing of this action in state court in Georgia, two male children were born on October 7, 1983, at the Griffin-Spalding County Hospital in Griffin, Georgia. They were switched before leaving the hospital, and Jodie Denise Paul, formerly known as Jodie Denise Pope, the petitioner herein, took home a child that was to have been put up for adoption through the Georgia Department of Human Resources. Said child is now known as Cameron Keith Pope. The petitioner's natural child, now known as Melvin Eugene Moore, was given up to the Georgia Department of Human Resources, and placed with Eugene and Edith Moore, respondents herein, and said child was later adopted by the respondents in Liberty County, Georgia Superior Court. The respondents have exclusively raised and had sole custody of Melvin Eugene Moore, the petitioner's natural child, since shortly after his birth until late November 1991. Likewise, the petitioner has raised Cameron Keith Pope since his birth. Both children are now nine (9) years of age.

After discovery of the switch by blood tests during divorce proceedings of the Popes in 1988, the petitioner sought to adopt the child she raised from birth, and also sought to obtain custody of her natural child, Melvin Eugene Moore, whom she had never met. Her adoption petition was granted in Spalding County Superior Court, and the judgment was appealed by the respondents. In *Moore v. Pope*, 196 Ga. App. 475 (1990), the Georgia Court of Appeals reversed the trial court's holding saying that Ms. Paul did not have standing to bring the adoption petition since she was neither a step-parent nor relative

of the child. The Georgia Supreme Court granted certiorari, and in *Pope v. Moore*, 261 Ga. 253 (1991), ruled that the Moores had no standing to object to the adoption as they were not blood relatives of the child. Therefore, Ms. Paul, the petitioner herein, has succeeded in adopting one of the switched children, who was supposed to have been adopted by the Moores through the Georgia Department of Human Resources, and she is seeking certiorari to review a state court order dated October 2, 1991, awarding joint custody of her natural child to Ms. Paul, her ex-husband, and the Moores. The order of Judge Frank M. Eldridge is a lengthy discussion of the competing interests and rights of the parties, as well as the law involved, and resembles something Solomon would have done in this difficult and unique situation. (This order appears in the petitioner's petition at pages 16a through 32a and again herein at Appendix A).

If successful in reversing the trial court, Jodie Paul would retain both of the children which were swapped at birth, stripping the Moores of a nine (9) year old child they have raised from infancy and leaving the Moores with no child.

APPELLATE COURT ACTION

On November 1, 1991, Ms. Paul simultaneously filed an application for discretionary appeal and notice of appeal in the Supreme Court of Georgia of the trial court's custody order of October 2, 1991. In Ms. Paul's application for discretionary appeal, she failed to raise as an enumeration of error denial of due process based on

the trial court's alleged failure to conduct an evidentiary hearing on the best interests of the child. The Georgia Supreme Court denied her application for discretionary appeal on November 25, 1991. Ms. Paul further failed to file a motion for rehearing upon denial of her application for discretionary appeal. She has continued to pursue her direct appeal through the Supreme Court of Georgia.

The Moores countered by filing a motion to dismiss Ms. Paul's notice of appeal on the grounds that a direct appeal was not appropriate since Ms. Paul's application for discretionary appeal had been denied. The case was then transferred to the Georgia Court of Appeals, and the Moores again filed a motion to dismiss on the same grounds. Said motion was granted on March 10, 1992. Ms. Paul's motion for rehearing was denied on March 25, 1992. On April 3, 1992, Ms. Paul filed a petition for writ of certiorari with the Georgia Supreme Court, which was denied on July 2, 1992.

After the trial court's order of October 2, 1991, the Moores permitted Jodie Pope (now Paul) to take the child to Georgia for a visit during the Thanksgiving holiday. The Moores have never seen their son since because the petitioner refused to return the child in violation of the trial court's order.

In the Petition for Writ of Certiorari, the Court may notice (page 3 and footnotes 28 and 29) allegations by the petitioner that Edith Moore had abused Melvin by cursing at him and hitting him. These allegations stem from affidavits of neighbors solicited by the petitioner at the time she refused to return the child.

The respondents deny that the child has been abused and can show that these Fort Knox, Kentucky neighbors' claims were inquired into by authorities and were found to be unsubstantiated. These claims were totally unknown at the time of the Court's order of October 2, 1991, and none of the petitioner's affiants have testified in any proceeding in this matter.

The Uniform Child Custody Jurisdiction Act would provide the petitioner opportunity to seek modification of custody if she had evidence of abuse. (Kentucky Revised Statutes, Section 403.400 et seq.)

The facts of this case show that the petitioner in no way had her parental rights terminated, but rather was awarded joint custody of Melvin Eugene Moore. The trial court's order states,

> "In balancing the respective rights of the Popes and Moores, they must stand equal and are entitled to joint custody rights of the boy. This means that all are entitled to school, medical, religious and extra-curricular reports on the boy and have a voice in deciding issues concerning the health, safety, welfare, morals, religion and education of the boy . . . " (Petition, p. 28a, Appendix A hereto, p. 14).

ARGUMENT

This is not a case in which it is appropriate to grant the petition for a writ of certiorari in accordance with the Rules of the Supreme Court of the United States. Respondents respectfully request that the petition be denied for the following reasons:

1. THE "QUESTIONS PRESENTED" IN THE PETITION ARE NOT ACCURATE PRESENTATIONS OF THE LEGAL RULINGS IN THE CASE.

At Rule 14.5, the Rules of the Supreme Court of the United States state,

> "The failure of a petitioner to present *with accuracy*, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition."

The petition presents three muddled questions which are all interrelated. The questions all presume a totally inaccurate, false proposition that the petitioner herein has had her parental rights terminated. The case was a custody decision in which the court balanced the interests of all the parties. Jodie Pope (Paul) no more had her parental rights terminated than did Walter Pope, Melvin's natural father, who favored custody remaining in the Moores. The order (Petition, pp. 16a - 32a and Appendix A hereto) speaks for itself.

These inaccurate statements by the petitioner should be "sufficient reason for denying the petition."

2. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THIS PETITION.

Rule 10 of the Supreme Court Rules provides that "review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Petitioner seeks review of a state

court order awarding joint custody of a child mistakenly switched at birth and raised by non-biological parents. The factual situation of the case at bar is bizarre and unlikely to happen again. Available to the petitioner is the remedy of filing a change of custody proceeding in Kentucky, the home state of the child, under the Uniform Child Custody Jurisdiction Act which has been adopted by the states of Kentucky and Georgia. There are no special and important reasons to grant certiorari.

Rule 10.1 (a), (b), and (c) of the United States Supreme Court Rules indicate the character of reasons this court will consider in reviewing a petition for writ of certiorari. Rule 10.1 (a) involves a United States court of appeals decision and can be excluded. It is difficult to determine if the petitioner is seeking a review under (b) "when a state court has determined a federal question in a way that conflicts with the decision of another state court or of a United States court of appeals," or (c) "when a state court has decided an important question of federal law which has not been, but should be, settled by the Supreme Court or has decided a federal question in a way that conflicts with applicable decisions of the Supreme Court." The case at bar fits neither. Had the petitioner attacked the constitutionality of the Georgia discretionary appeal law, there might be constitutional issues for this court to entertain. Petitioner seeks review on general Fourteenth Amendment due process grounds.

3. PETITIONER IN HER STATEMENT OF THE CASE DOES NOT SPECIFY THE STAGE IN THE PROCEEDINGS AT WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED.

At Rule 14.1 (h) the Rules of the Supreme Court of the United States provide,

> "If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised . . . "

The provisions of Rule 14.1 (h) were not complied with in the petitioner's statement of the case. The petition seems to present two issues: (1) that her parental rights were terminated without surrender or termination hearing, thus denying her due process, and (2) the trial court's failure to conduct an evidentiary hearing on the best interests of the child, thus denying her due process.

As to the first issue, the petitioner's entire argument is based upon a mis-statement of fact, i.e., that her parental rights were terminated. As to the second issue regarding the failure of the trial court to conduct an evidentiary hearing on the best interests of the child, fitness of the competing parties was never an issue in the trial court. The petitioner's crossclaim for physical custody filed on May 21, 1991, in the state court makes no allegation that the respondents are unfit. The petitioner failed to raise this issue as an enumeration of error in her application for discretionary appeal, the first and by far most critical stage of the appellate process. (Attached

hereto at Appendix B is that brief). The petitioner never sought rehearing on her application for discretionary appeal, so this argument should be deemed abandoned since it was not timely raised.

4. PETITIONER HAS A REMEDY AND COMES BEFORE THE COURT WITH UNCLEAN HANDS.

After the trial court's order of October 2, 1991, the Moores allowed Melvin Eugene Moore to leave his Kentucky home to visit the petitioner, Jodie Paul, in Georgia over the Thanksgiving holidays for the first time. Ms. Paul refused to return the child at the expiration of the visitation period as had been agreed, and has continued to hold said child in violation of the trial court's order. She elected to take the law into her own hands rather than follow proper procedure seeking custody through the courts.

The petitioner argues that the Georgia Supreme Court has foreclosed her last opportunity to have any post-termination review of the merits. There was no termination. The petitioner has a clear remedy under the terms of the Uniform Child Custody Jurisdiction Act (Kentucky Revised Statutes, Section 403.400, et seq.) in the form of a motion for modification of custody in the courts of the child's "home state."

CONCLUSION

For the foregoing reasons, the respondents respectfully pray that the Petition for a Writ of Certiorari to review the decision of the Georgia Supreme Court be denied.

Respectfully submitted,

David T. Gray
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550 W. Lincoln Trail Boulevard
Radcliff, Kentucky 40160
(502) 351-4404

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P. O. Box 551
Griffin, Georgia 30223

Counsel for Respondents
Eugene Moore and Edith Moore

APPENDIX A

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JODIE DENISE POPE, Plaintiff vs. GEORGIA STATE DEPT. OF HUMAN RESOURCES, GEORGIA STATE DIV. OF FAMILY AND CHILDREN SERVICES, SPALDING COUNTY DEPT. OF FAMILY AND CHILDREN SERVICES, WARE COUNTY DEPT. FAMILY AND CHILDREN SERVICES, JAMES G. LEDBETTER, SHIRLEY A. TATE, PATRICIS L. JOHNSON, DOUGLAS G. GREENWELL, CAROL F. DINGLER, WILLIAM M. DENTON, JANICE L. MADDOX, and HENRIETTA LOVETT, Defendants	CIVIL ACTION FILE NO. D-80775
WALTER KEITH POPE, Plaintiff vs. GEORGIA STATE DEPT. OF HUMAN RESOURCES, GEORGIA STATE DIV. OF FAMILY AND CHILDREN SERVICES, SPALDING COUNTY DEPT. OF FAMILY AND CHILDREN SERVICES, WARE COUNTY DEPT. FAMILY AND CHILDREN SERVICES, JAMES G. LEDBETTER, SHIRLEY A. TATE, PATRICIA L. JOHNSON, DOUGLAS	CIVIL ACTION FILE NO. D-80852

G. GREENWELL, CAROL R. DINGLER, WILLIAM M. DENTON, JANICE L. MADDOX, and HENRIETTA LOVETT, Defendants	)	
EUGENE MOORE and EDITH MOORE, Plaintiffs vs. GRIFFIN SPALDING COUNTY HOSPITAL AUTHORITY d/b/a GRIFFIN SPALDING HOSPITAL, VICKIE VAUGHN, LOIS SHIRAH, GEORGIA STATE DEPT. OF HUMAN RESOURCES, GEORGIA STATE DIV. FAMILY AND CHILDREN SERVICES, SPALDING COUNTY DEPT. FAMILY AND CHILDREN SERVICES, WARE COUNTY DEPT. FAMILY AND CHILDREN SERVICES, JANICE L. MADDOX and HENRIETTA LOVETT, Plaintiffs vs. JODIE DENISE POPE and WALTER KEITH POPE, Third Party Defendants	)	CIVIL ACTION FILE NO. D-85627

ORDER

I

JURISDICTION

This Court has personal jurisdiction over all the parties which includes the Popes and the Moores. The Moores have submitted themselves to the jurisdiction of this Court by making a general appearance to assert their claims and the Popes have been joined individually by third-party action and have brought counter-suit for custody against the Moores.

The Uniform Interstate Custody Act, O.C.G.A. 19-9-40 et seq., does not apply because the validity of the judgment of adoption is being attacked collaterally, and the present custody order of the Moores' depends upon the presumptive validity of the adoption.

Mrs. Pope can collaterally attack the judgment of adoption rather than seek to set aside the judgment under O.C.G.A. 9-11-60(b) because she is the natural parent of the minor child; her parental rights have never been statutorily or constitutionally terminated, and the judgment, neither under the doctrines of res judicata, collateral estoppel or estoppel by judgment, bind her since she was neither a party nor privy and had no notice of such action.

No action is now pending before a Georgia trial court seeking to determine the custody of the minor child.

Mrs. Pope commenced her action to regain her son as soon as she discovered or reasonably could have discovered that her son had been switched at birth. Neither the equitable doctrine of laches nor any statute of limitations

bars this action to regain custody of the Pope child by birth.

II

RATIONALE

Freedom constitutes the bedrock of this Republic. The fundamental duty of government mut be the protection of its citizens in their " . . . life, liberty and pursuit of happiness."[1] "Protection to person and property is the paramount duty of government and shall be impartial and complete."[2] Human rights or personal liberties evolved at common law from property rights.[3] At common law, property rights had the greatest legal protection as a personal right; human rights developed only in a system of legal rights that safeguarded a person's rights to property.

Locke, Voltaire and Rousseau influenced Thomas Jefferson, Benjamin Franklin, Samuel Adams and the other framers of both the Declaration of Independence and The Constitution of the United States. Certain fundamental and inalienable rights have been given to all citizens as human rights. These human rights evolved in the conceptualization of the 17th and 18th century political thinkers from property rights and found clear expression

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[1] *Declaration of Independence;* see also Preamble, Constitution of the United States of America.

[2] Art. I, Sec. I. Par. II, 1983 Constitution of Georgia; Art. I, Sec. II, Par. III of the 1976 Constitution of Georgia.

[3] Homes, *The Common Law;* Lerner, *The Mind and Faith of Justice Holmes,* Random House, Inc., (N.Y., 1948).

in the Declaration of Independence and in the Bill of Rights. Whether such rights derive from natural law or from a social compact of the governed, such rights became guaranteed in the Constitution.

The Jeffersonian concept of human rights has clear expression through "The powers not delegated to the United States by the Constitution, not prohibited by it to the States, are reserved to the States respectively *or to the people.*"[4] The Bill of Rights protects the people from unauthorized and unreasonable intrusion into their lives by any government. The right of privacy from government invasion comes within such reserved right by necessity and exists as a pneumbra right derived from the First, Third, Fourth, Fifth and Ninth Amendments.[5]

Constitutional privacy rights have been found to exist by implicit expression in the Georgia Constitution as well.[6] The protection of citizens by the State " . . . in the full enjoyment of the rights, privileges, and immunities due to such citizenship," has such broad ambit as to encompass the privilege of privacy from unwarranted

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[4] Tenth Amendment, The Constitution of the United States

[5] *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); see also dissent by Justice Douglas in *Poe v. Ullman*, 367 U.S. 497, 509-521 (1961); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942).

[6] *Jefferson v. Griffin & c. Hosp. Auth.*, 247 Ga. 86, 274 S.E.2d 457 (1981); *Zant v. Prevatte*, 248 Ga. 832, 266 S.E.2d 715 (1982); *In re: L.H.R.*, 253 Ga. 439, 446, 321 S.E.2d 716 (1984); *State of Ga. v. McAfee*, 259 Ga. 579, 385 S.E.2d 651 (1989); *Kirby v. Spivey*, 167 Ga. App. 751, 753(2), 307 S.E.2d 538 (1983).

state intrusion.[7] Parents have a legally protected interest in the birth of progeny.[8]

The family constitutes the basic unit of society. Preservation of the family is necessary to protect society. At common law, the familial relationship had protection as a property right because such analysis afforded the highest protection under such analysis; when human rights developed and received higher protection when balanced against property rights, familial relations required a human rights analysis. Family relationships represent a complex bundle of human rights which, unlike property rights, intertwine, grow together and branch off without neat separability. Absent the family, society cannot properly socialize, educate, inculcate, motivate and nurture the infant to become a mature, moral, productive individual. Totalitarian societies from Sparta, the Third Reich, and the Soviet Union have tried and failed to replace the family with the State.

Basic to the family must be the minor child. Until the minor child approaches majority, the child has no individual civil and constitutional rights that can be asserted either against the parent, someone in loco parentis or society. The parents, by the pneumbra of their constitutional and civil rights, protect the minor child from

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[7] Art. I, Sec. I, Par. VII, The 1983 Constitution of Georgia; see also Art. I, Sec. II, Par IX, The 1976 Constitution of Georgia

[8] *Atlanta Ob. & Gyn. Group v. Abelson*, 195 Ga. App. 274, 392 S.E.2d 916 (1990), see also *Fulton-DeKalb Hosp. Auth. v. Graves*, 252 Ga. 441, 314 S.E.2d 653 (1984); *Azzolino v. Dingfolder*, 337 S.E.2d 528 (NC, 1985); *Wilson v. Kuenzi*, 751 S.W.2d 741 (MO, 1988); *Smith v. Cote*, 513 A.2d 341, 347 (N.H., 1986)

others. The parents exercise religion and speech extent to the minor. If the minor seeks to exercise independent freedom of speech or from search and seizure against a *parens patriae,* i.e., a school, when the parents have no involvement, then such right has no protection as a constitutional right.[9] The parent has a natural or fundamental right in the relationship with the child, " . . . bone of my bone, flesh of my flesh."[10]

> If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[11]

It logically follows that if individuals have a constitutionally protected privacy interest in whether or not to have a child, such same constitutionally protected privacy interest protects the relationship between the parent and child, once born, as a human right superior to any common law rights or interests.

Progeny provide parents with posterity so that the person can preserve their identity, tradition, and existence. The child may be a vital aspect of the parent's religion. Parenting permits a person to mature, sacrifice, love, share and grow. Parenting holds endless opportunities in the relationship for both the parent and child.

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[9] *Hazelwood School Dist., et al v. Kuhlmeir,* 484 U.S. 260, 108 S.C. 562 (1988); *New Jersey v. T.L.O.,* 469 U.S. 325, 105 S.C. 733, 83 L.Ed.2d 720 (1985)

[10] *Supra* at note 8

[11] *Eisenstadt v. Baird, supra* at p. 453

The right to choose to assume such part in creation is a fundamental civil right.[12]

Barren couples, same sex couples and single adults, seek the opportunity to parent through adoption. Fees and expenses of twenty thousand dollars to adopt in Georgia from private agencies have become common. Private agencies search Asia, Eastern Europe and South and Central America for children to fill the demand for adoptable children. Even AIDS, retarded and handicapped children fill the needs to parent of single adults.

The State of Georgia has chosen to take State action to regulate, to approve and to supervise adoptions. The State licenses private agencies to place children. The State, through the Family and Children Services of the Department of Human Resources, screens and approves most adoptions and, as in this case, actually places the child for adoption. The Court, for the State, carries out the final adoption by terminating parental rights and granting an adoption decree changing the legal relationship of the parties and the child.

The State has a compelling interest in the adoption of orphans and unwanted, neglected or abused minors. The State has a vital interest in the health, welfare, morals, safety and education of all minors and the status of a minor. Making them eligible for adoption also places them at risk regarding proper health, welfare, education, morals and safety. Unless such minors receive proper care and nurture, they may fail to grow into mature productive citizens and instead become liabilities to society as

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[12] *Supra*, note 5

antisocial, addictive, dependent, mentally ill or non-productive. Through adoption, the minor may achieve a stable home environment where he can receive the love, nurture and care that will make it more probable that the child will become a normal mature adult, both physically and psychologically. If the State fails to place unwanted minors for adoption, it has the burden, both financially and developmentally, of raising the minor; to carry out such responsibility means either institutionalization or foster care. Both methods of rearing children have risks for the child of a traumatic nature, both physically and psychologically. A disproportionate number of psychopaths, sociopaths, and abusers, both physically and sexually, come from individuals who were raised, in whole or in part, either in institutions or foster care. Another consideration of a lesser State interest lies in affording the opportunity to parent, by adoption, to those the State, by reasonable criteria, finds are qualified to rear, nurture and care for a minor.

Adoption laws have been passed and amended that make it easier and easier to adopt in less time. The early adoption statute in Georgia required six months and two court hearings before the adoption became final.[13] The notice and hearing to place temporary custody occurred no less than 75 days after the petition had been filed.[14] Such liberalization of the adoption standards caused "without justifiable cause"[15] to be eliminated from the termination of a parent's rights in a step-parent adoption

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[13] Ga. Laws 1941, pp. 300, 305, Sec. 11

[14] Id, p. 302, Sec. 5

[15] Ga.L. 1972, pp. 201, 211, Sec. 1, Sec. 74-405(a)(1)(2)

on the grounds of failure "to communicate" or "to provide for the care and support" for one year or more;[16] this code section was declared unconstitutional as violating due process of law by denying the parent the opportunity to show the reason for such failure.[17] Those who lobbied for passage or amendment of adoption laws have ignored and not adequately safeguarded the rights of natural or putative parents in the termination of parental rights. Fraud and duress in obtaining parental consent, mistake in the identity of the child to be adopted, and inadequacy of notice to a parent or putative parent have not been dealt with adequately by the adoption statutes. The Courts have had to fashion remedies and procedures to fill statutory gaps in adoption.[18]

Since constitutional rights of both parents or the birth mother and putative biological father are involved, notice and an opportunity to be heard prior to termination of the parental right is essential as a matter of procedural and substantive due process under both the Fifth and

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[16] Ga.L. 1979, p. 1182, Sec. 5

[17] *Thorne v. Padgett,* 259 Ga. 650, 386 S.E.2d 155 (1989)

[18] *In re Baby Girl Eason,* 257 Ga. 212, 358 S.E.2d 459 (1987); *Duncan v. Harden,* 234 Ga. 204, 214 S.E.2d 890 (1975); *Wellfort v. Bowick,* 147 Ga. App. 565, 249 S.E.2d 363 (1978); *Downs v. Wortman,* 228 Ga. 315, 184 S.E.2d 387 (1971); *Smith v. Finstad,* 247 Ga. 603, 277 S.E.2d 736 (1981); *Chandler v. Cochran,* 247 Ga. 603, 277 S.E.2d 736 (1981); *Chandler v. Cochran,* 247 Ga. 184, 275 S.E.2d 23 (1981); *In re White,* 254 Ga. 678, 333 S.E.2d 588 (1985); *Thorne v. Padgett,* 259 Ga. 650, *supra; McDonald v. Hester,* 115 Ga. App. 740, 155 S.E.2d 720 (1967); *Drummond v. Fulton County Dept. of Family and Children Serv.,* 547 F.2d 835 (5th Cir.) on rehearing 563 F.2d 1200 (5th Cir., 1977) cert. denied 437 U.S. 910, 98 S.Ct. 3103, 57 L.Ed.2d 1141 (1978).

Fourteenth Amendments of the Constitution of the United States[19] and Article I, Section I, Par. I, of the 1983 Constitution of Georgia,[20] Procedures for surrender of or termination of parental rights require strict construction against the adoption and in favor of the parent.[21] Before an adoption can become legal, the consent of the parents or the abandonment and termination of their parental rights must occur.[22] Adoption did not exist at common law, thus it is a creature of statute.[23]

In this case, all legal steps necessary to effectuate a *de jure* adoption have been met, including the proper termination of the parental rights of the baby boy to be adopted by the Moores. However, the subject of the adoption was switched with the Pope's baby boy so that the Moores received the Pope baby, and the Popes received the baby boy to be adopted by the Moores. The legal

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[19] *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Quillian v. Walcott*, 434 U.S. 246, 546 L.Ed.2d 511, 98 S.Ct. 549 (1978); *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979); *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983); *Michael H. & Victoria D. v. Gerald D.*, ___ U.S. ___, 109 S.Ct. 2333 (1989)

[20] *In re Baby Girl Eason*, 276 Ga. 292, *supra*

[21] *Johnson v. Smith*, 251 Ga. 1, 302 S.E.2d 542 (1983); *Thorne v. Padgett*, 259 Ga. 650, *supra* at 17; *Nelson v. Taylor*, 244 Ga. 657, 261 S.E.2d 579 (1979)

[22] *Roberts v. Muscogee County Dept. Family and Children Serv.*, 150 Ga. App. 750, 258 S.E.2d 689 (1979); *Owens v. Griggs*, 151 Ga. App. 730, 261 S.E.2d 463 (1979); *Spires v. Bittick*, 171 Ga. App. 914, 321 S.E.2d 407 (1984); *Ritchie v. Dillon*, 103 Ga. App. 7, 118 S.E.2d 115 (1961); *Wojciechowski v. Allen*, 238 Ga. 566, 234 S.E.2d 325 (1977); *Ellis v. Woods*, 214 Ga. 105, 103 S.E.2d 297 (1958).

[23] *Johnson v. Eidson*, 235 Ga. 820, 221 S.E.2d 813 (1976)

adoption steps and court action were completed so that the Moores believed that they had a *de jure* adoption of the proper child. The Court went through the three-step decision-making to determine: first, if the parents consented; second, are the adopting parents worthy and able to care for the child; and third, is the adoption in the best interest of the child.[24] All parties and the Court operated on a mistake of law and fact as to the identity of the adopted child. Thus, the adoption is a *de facto* adoption, good against the entire world except the natural or biological parents, the Popes, whose rights had not even been attempted to be terminate; and no grounds for termination existed then or now. The Popes, as the natural parents, possess and retain all the rights, duties and responsibilities of paternity. Mrs. Pope is the biological, natural and lawful mother of this child.

For over eight years the Moores have loved, nurtured and reared the boy as their own son. Until the Popes discovered they had a boy who was not their biological son, the Moores, in law and in fact, exercised legal paternity which is equivalent in law to the birth of the child.[25] They have given freely of their time, emotions and material possessions to support this boy as their son. To the boy and to the Moores there exists a bonding and familial relationship that no court ruling can undo. This child's identity and self concept has developed from the familial

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[24] *Allen v. Morgan*, 75 Ga. App. 738, 44 S.E.2d 500 (1947); *Herrin v. Graham*, 87 Ga. App. 291, 73 S.E.2d 572 (1952)

[25] *Mulligan v. Mulligan*, 201 Ga. 444, 39 S.E.2d 699 (1946); *Thornton v. Anderson*, 207 Ga. 714, 64 S.E.2d 186 (1951); *Warner v. First Nat'l Bank*, 242 Ga. 661, 251 S.E.2d 511 (1978)

relationship with the Moores. The Moores have fought to protect and to shield their son, and he has sought refuge within the pneumbra of their civil rights and their right to privacy. In the creation of this relationship, the Moores must be held blameless. They have developed human rights and property interests in the adopted boy under color of law through a *de facto* adoption. They were granted parental rights by the State of Georgia and have acted *in loco parentis* for the entire life of the boy. The boy's privacy rights and expectations have been shrouded by the Moores' rights rather than the Popes' who have never had physical custody after the boy left the hospital.

While the Popes remain the biological, natural and legal parents of this boy, the Moores, as *loco parentis* through *de facto* adoption, over eight years have developed vested constitutional privacy rights in the relationship as well that must be balanced. This situation is analogous to a divorce in which each parent has equal rights to custody, and the Court must decide the case on the basis of the best interest of the child. Where there exist conflicts in constitutional rights the Court must engage in a balancing of rights and interests.

In matters of adoption, the Court has very broad discretion.[26] The paramount concern of the Court must be

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[26] *McCall v. Van Popering*, 124 Ga. App. 149, 183 S.E.2d 411 (1971); *Nix v. Sanders*, 136 Ga. App. 159, 223 S.E.2d 21 (1975); *Ritchie v. Dillon*, 103 Ga. App. 7, *supra; Owens v. Griggs*, 151 Ga. App. 730, *supra; Johnson v. Taylor*, 153 Ga. App. 15, 264 S.E.2d 512 (1980); *Chandler v. Cochran*, 247 Ga. 184, *supra; Cox v. Bohannon*, 86 Ga. App. 236, 71 S.E.2d 440 (1952)

the welfare and best interests of the child.[27] In balancing the respective rights of the Popes and Moores, they must stand equal and are entitled to joint custody rights of the boy. This means that all are entitled to school, medical, religious and extracurricular reports on the boy and have a voice in deciding issues concerning the health, safety, welfare, morals, religion and education of the boy. To determine visitation and custody the Court must resort to the best interest of the child test.

The Popes have been divorced in a contested action which raised the issue of the paternity of the child that they raised. From the litigation and the divorce, it can reasonably be inferred that there still exists some tension between them. Mrs. Pope, to her credit, fought and finally won the right to adopt the only son that she has known and has reared over the last eight years. She works as a waitress to support herself and her adopted son. She lives in Griffin, Spalding County, Georgia, a small city lying in the Piedmont region of central Georgia which has a mixed agricultural, mill, manufacturing, retail and service economy.

The Moores are a mixed race couple that Family and Children Services have found suitable people for adoption of a boy. They have fought long and hard to protect their adopted son on the income of a career non-commissioned officer. The significance of the mixed marriage is that they sought to adopt a child of mixed parentage and have reared the child with the identity of mixed heritage.

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[27] *Herrin v. Graham*, 87 Ga. App. 291, *supra; Allen v. Morgan*, 75 Ga. App. 738, *supra; Hester v. Mathis*, 147 Ga. App. 257, 248 S.E.2d 23 (1981)

At eight years of age, this boy has the self image and self concept of a racially mixed child in a racially mixed family. The military posts, both in the United States and abroad, have a concentration of more racially mixed families, both civilian and military, than does Griffin, Georgia; there exists greater racial tolerance and acceptance in the military than in the country as a whole. The Moores have provided a loving, nurturing and stable environment for the last eight years. The military with its direct or sudsidized education provides a better educational, cultural, and developmental environment than does Griffin, Georgia. The health system provided for military dependents equals or is superior to most private health insurance plans. Mr. Moore has provided a positive male role model, but Mrs. Pope has to act as a single parent taking on the roles of both mother and father. Being a single parent is difficult but having two males in this age range, who do not know each other, would be taxing with risks of sibling rivalry and favoritism. To adjust and cope with being uprooted from one family and dropped into another in a different environment would be traumatic and cause unreasonable anxiety, lack of structure, and identity problems for the child.

The Court finds that it is in the best interest of the child to remain in the physical custody of the Moores with reasonable visitation with the Popes. As custodial parents, the Moores must consult with Mrs. Pope regarding education, health, safety, welfare, morals and development, but in the event of a conflict the Moores shall make all final decisions.

The divorce between Mr. and Mrs. Pope gave custody of the child to Mrs. Pope with visitation to Mr. Pope. The

child shall visit with the Popes from June 15th until August 15th of each summer. If the Moores are living or are stationed in America, the Popes shall have as additional visitation the Spring vacation, Thanksgiving holidays and one portion of the Christmas holidays as observed by the school the child attends. In odd numbered years, Mrs. Pope shall have Christmas Day and the days observed prior to Christmas Day; in even years, Mrs. Pope shall have the day after Christmas through New Year's Day. Mr. Pope may have the first, third, fifth and seventh weekends of the summer period from 6:00 P.M. on Friday until 6:00 P.M. on Sunday.

The natural parents and the adoptive parents individually have the duty to support this minor child. The Court hereby orders that the Moores support the child. The Court hereby orders that the Moores support the child by paying all his necessities, except as hereinafter provided, for the period of their custody; Mrs. Pope has the duty to pay all such necessities during the minor child's visitation with her; Mr. Pope has the duty to pay all such necessities during the minor child's visitation with him. Medical expenses shall include all expenses of health care providers whether for dental care, service or treatment by a medical physician, surgeon, osteopath, psychologist, optometrist or optician; the Moores shall pay one-half of all such expenses not covered by insurance; Mrs. Pope shall pay one-fourth of such expenses and Mr. Pope shall pay one-fourth of such expenses. The Moores shall either pay and seek medical coverage reimbursement of submit the insurance claims within thirty (30) days of the receipt of any bill; the Moores shall, within forty-five (45) days after the submission of an

insurance claim and it remains unpaid or it is paid within such time, submit copies of the bills and the amount to be paid to each of the Popes individually; the Popes shall remit such amount within thirty (30) days to the Moores. If, after payment by the Popes, the Moores receive an insurance reimbursement which covers costs paid by either or both of the Popes, the Moores shall remit such proportionate share of the reimbursement. The Popes each shall be liable for twenty-five percent (25%) of any educational fees, books, or tuition, extra-curricular activities, sports or camp, with the Moores paying the remainder. Mrs. Pope shall be responsible for and pay the transportation costs of the minor child for visitation as child support.

The Court finds that there exists no just reason why this order should not be immediately entered as the final judgment of this Court and orders that the Clerk enter this order as a Final Judgment.

In the event that any party files a notice of appeal, such filing of appeal shall act to stay the effect of this order until it becomes a final judgment as a matter of law.

SO ORDERED this 2 day of October, 1991.

/s/ Frank M. Eldridge
FRANK M. ELDRIDGE,
Judge
Fulton Superior Court
Atlanta Judicial Circuit

APPENDIX B

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JODIE DENISE POPE, Plaintiff/Petitioner vs. GEORGIA STATE DEPT. OF HUMAN RESOURCES, JAMES G. LEDBETTER, L. PATRICIA JOHNSON, CAROL F. DINGLER, JANICE L. MADDOX, HENRIETTA LOVETT, ROSSERLYN ANDERSEN, BARBARA HOLMES and ELAINE GRADDY, Defendants/Respondents	CIVIL ACTION FILE NUMBER: D-80775
WALTER KEITH POPE, Plaintiff, vs. GEORGIA STATE DEPT. OF HUMAN RESOURCES, GEORGIA STATE DIV. OF FAMILY AND CHILDREN SERVICES, SPALDING COUNTY DEPT. OF FAMILY AND CHILDREN SERVICES, WARE COUNTY DEPT. FAMILY AND CHILDREN SERVICES, JAMES G. LEDBETTER, SHIRLEY A. TATE, PATRICIA L. JOHNSON, DOUGLAS G. GREENWELL, CAROL R. DINGLER, WILLIAM M. DENTON, JANICE L. MADDOX, and HENRIETTA LOVETT, Defendants/Respondents	CIVIL ACTION FILE NUMBER: D-80852

EUGENE MOORE AND EDITH MOORE, Plaintiffs/Respondents vs. GRIFFIN SPALDING COUNTY HOSPITAL AUTHORITY d/b/a GRIFFIN SPALDING HOSPITAL, VICKIE VAUGHN, LOIS SHIRAH, GEORGIA STATE DEPT. OF HUMAN RESOURCES, GEORGIA STATE DIV. FAMILY AND CHILDREN SERVICES, SPALDING COUNTY DEPT. FAMILY AND CHILDREN SERVICES, WARE COUNTY DEPT. FAMILY AND CHILDREN SERVICES, JANICE L. MADDOX and HENRIETTA LOVETT, Defendants/Respondents vs. JODIE DENISE POPE and WALTER KEITH POPE, Third-Party Defendant/ Petitioner	CIVIL ACTION FILE NUMBER: D-85627

APPLICATION FOR DISCRETIONARY APPEAL OF FINAL JUDGMENT

NOW COMES Jodie Denise Pope, pursuant to O.C.G.A. 5-6-34(a)(1) and 5-6-35(a)(2), Rule 25 of the Rules of the Georgia Supreme Court, and related law petitions this Court for Leave to Appeal a final judgment entered by Superior Court of Fulton County on October 2, 1991. The petitioner has also simultaneously filed a

Notice of Appeal in the lower court pursuant to O.C.G.A. 5-6-51 and related law.

ENUMERATION OF ERROR

Rulings of the trial court which are enumerated as error and for which leave to appeal is sought are as follows:

(1) The trial court erred by holding that the mistaken placement of the Pope child in an adoption which was attempted for another child will create constitutionally cognizable rights in the third-party couple and divests the parental rights of the natural mother without notice, surrender, or termination.

(2) The trial court erred by holding that a natural mother's constitutionally cognizable parental rights, which have neither been surrendered by her nor terminated at law, may be defeated by a third-party couple who seek to retain physical custody of the natural mother's child.

A discretionary appeal of the final judgment is appropriate where: "(1) reversible error appears to exist, or (2) the establishment of a precedent is desirable." Georgia Supreme Court Rule 25. In this action, both grounds provide ample merit for granting the instant application for appeal.

First, the trial court's grant of physical custody of the Pope child to a third-party couple over the objections of a natural mother, whose parental rights have never been surrendered or terminated, is patent reversible error in the face of all known case law, statutory provisions, and

state and federal constitutional guarantees recognized by the courts of this state.

Second, it would be an alarming and dangerous precedent for a court of this state to allow the natural mother's parental rights to her child to be severed without her voluntary surrender or legal termination and to allow a trial court to do so by simply implementing the best interest of the child analysis whenever custody is challenged by a third-party.

JURISDICTIONAL STATEMENT

The Georgia Supreme Court, rather than the Georgia Court of Appeals, has jurisdiction of this case on appeal for reasons that include the court's equitable jurisdiction as well as the Georgia and United States constitutional issues raised. Ga. Const., Art. VI, 6, Para. II(1) and III(2). It should be noted that this court has once previously accepted jurisdiction over one of the three actions appealed from here, *Jodie Denise Pope vs. DHR, et al.*, as it was transferred on an interlocutory appeal from the Georgia Court of Appeals to the Georgia Supreme Court and then vacated for other reasons.

REASONS FOR GRANTING APPLICATION

A. STATEMENT OF THE CASE

The final order from which the petitioner Jodie Denise Pope makes this application for appeal has been entered in three cases. Each of these cases essentially involves those issues relating to the DHR defendants' failure to recognize that they were attempting to place the wrong

child for adoption following the switch of Jodie Denise Pope's white male child [hereinafter referred to as the "Pope child"] with a mixed race child [hereinafter referred to as the "Williams child"] shortly after birth in October 1983.

In the *initial case* filed against the DHR, Jodie Denise Pope brought a equitable count in order that the DHR be instructed to take all measures necessary to effect the return of the Pope child they had wrongly taken and placed with Eugene and Edith Moore. The *second case* was brought by Jodie Denise Pope's former husband and the Pope child's natural father, Walter Keith Pope, against the DHR defendants seeking only damages in tort. The *final case* against the DHR was filed by Eugene and Edith Moore seeking tort and contract damages. In the Moore's action against the DHR, after the DHR filed its answer and the DHR filed a third party complaint against Jodie Pope, Jodie Pope brought a cross claim against the Moores for physical custody of her natural son.

On October 2, 1991, Judge Frank Eldridge of Fulton County Superior Court entered an Order in all three cases properly noting that the 1984 attempted adoption by the Moores related to the Williams' child and was without notice to Jodie Denise Pope regarding the Pope child, and that Jodie Pope's parental rights as the natural mother had never been surrendered nor terminated. However, the trial court erred by utilizing a simple best interest of the child analysis and holding that the right to physical custody of her natural child had vested the third-party Moores as a result of a *de facto* adoption. It is from that Order from which the petitioner and natural mother Jodie Denise Pope make this application for discretionary

appeal of a final Order. A Notice of Appeal has been filed simultaneously below in Fulton County Superior Court.

B. ISSUES SOUGHT TO BE RAISED ON APPEAL

The issues to be raised on appeal involve the fundamental and inalienable *parental rights* of natural mother, Jodie Denise Pope, as they are challenged by a third-party couple who are unrelated by blood to the petitioner's natural son, who obtained physical custody of the Pope child only through their mistaken attempt to adopt another child, and who admit that the parental rights of the natural mother Ms. Pope have never been surrendered by her nor terminated at law. Because there has been no surrender or termination of the parental rights of Jodie Denise Pope to her natural son, the October 2, 1991 Final Order awarding physical custody of the Pope child to the third-party Moores is not only an absolute aberration of the case and statutory law in this state, but is represents an abject violation of those provisions securing parental rights in the Georgia and United States Constitution. *Lawson vs. Gambell,* 157 Ga. App. 193, 276 S.E.2d 686 (1981); *Drummond vs. Fulton County Department of Family and Children Services,* 237 S.E.2nd 839 (1976)

CONCLUSION

For the reasons given above, the petitioner and natural mother Jodie Denise Pope respectfully requests that this court grant its application for discretionary appeal.

THE MALONE FIRM

/s/ Thomas William Malone by RB

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